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No. 14084

United States
Court of Appeals
for the Ninth Circuit.

OREGON-WASHINGTON PLYWOOD COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-20-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Petitioner:

GEORGE J. PERKINS, ESQ.

For Respondent:

JOHN H. WELCH, ESQ.

The Tax Court of the United States

Docket No. 39553

OREGON-WASHINGTON PLYWOOD COMPANY, an Oregon Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols IT:90D:EEH) dated December 27, 1951, and as a basis of its proceedings alleges as follows:

(1) That the petitioner is an Oregon corporation and was such during all the calendar years 1944 and 1945. That during all of said years it was qualified to transact business in the State of Washington as a foreign corporation, and owned and operated a plywood plant at Tacoma, Washington. That its present general office is 1014 U. S. Bank Building, Portland (4), Oregon. The income and excess profit tax returns for the years in this proceedings involved, were filed with the United States Collector of Internal Revenue at Tacoma, Washington.

(2) The notice of deficiency (a copy of which together with the statements accompanying it are attached hereto marked Exhibit A) was mailed to the petitioner on the 27th day of December, 1951.

(3) The taxes in controversy are a deficiency of excess profit taxes determined for the calendar year ending December 31, 1944, in the amount of $19,-925.35, and an overassessment of income taxes for the same year in the amount of $9,321.80.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(A) By the Commissioner refusing to allow in the computation of excess profit credit on the basis of invested capital, 50 per cent of the average borrowed capital of the petitioner amounting to $171,-974.05 for the calendar year 1944, and amounting to $130,746.55 for the calendar year 1945, evidenced by a promissory note executed by petitioner, dated September 30, 1943, payable to the order of Peterman Manufacturing Company, originally for $400,-000.00 and interest at the rate of 3% per annum, and secured by a purchase and sale contract of approximately 3500 acres of timberland, in Tillamook County, Oregon, which contract was in effect a real estate mortgage to secure payment of said note.

(B) By the Commissioner ruling and holding that said promissory note and contract did not create or evidence an unconditional promise to pay the amounts stated in said note and contract and

did not qualify as borrowed capital within the meaning of Section 719(a) of the Internal Revenue Code.

(C) By the Commissioner determining an additional excess profit tax in the amount of $19,925.35 against the petitioner for the calendar year 1944.

(D) By the Commissioner disallowing a deduction from income in the year 1944 in the amount of $10,318.44 designated as "Cost of logs from Peterman" (item (d), page 2, Exhibit A), and allowing an offsetting deduction in the same amount, $10,-318.44, designated as "Interest accrued" (item (i), page 2, Exhibit A).

(E) By the Commissioner in adjusting petitioner's income for the year 1945 (items (c), (d), (g) and (h), page 5, Exhibit A) as follows:

	Commissioner's adjustments	Agreed to by petitioner	Error
Increase or (decrease) in net income—			
(d) Deduction for anticipated freight	$12,103.11	$12,103.11	
(c) Cost of logs from Peterman	1,180.85	)	
(h) Cost of logs used overstated	(5,457.86)	)	$7,826.10
Decrease in closing inventory		(12,103.11)	
(g) Accrued interest expense	(7,826.10)		(7,826.10)

(F) The Commissioner is in error in stating that the petitioner has agreed to the adjustments mentioned in the last two assignments of error.

(5) The facts on which the petitioner relies as the basis of this proceeding are as follows:

(A) The basis for the deficiency proposed is that the Commissioner, in his determination of the petitioner's excess profits tax credit, refused to allow credit for 50% of the petitioner's borrowed capital evidenced by a promissory note given by the petitioner to Peterman Manufacturing Company and secured by a purchase and sales contract of timberland. On August 30, 1943, petitioner entered into a written contract with T. A. Peterman and wife by which it agreed to purchase and they agreed to sell, approximately 3500 acres of timberland in Tillamook County, Oregon, at the agreed price of $500,000.00. The petitioner agreed to pay for said timberland $100,000.00 in cash on or before September 30, 1943, and give to Peterman Manufacturing Company its promissory note for $400,000.00. Petitioner paid the $100,000.00 and gave the note within said period. In the purchase contract petitioner unconditionally agreed to pay $500,000.00 for the timberland and in the note it unconditionally agreed to pay to the order of Peterman Manufacturing Company $400,000.00 together with interest on deferred balances at 3% per annum. The Petermans retained title to the land as security for the balance owing on the purchase price. Both the purchase contract and the note provide that payments on the principal of the note and accrued interest shall be made on the 15th day of each month, beginning with November, 1943, and

that the basis of the principal payments (meaning the amount of the monthly payments) to be the equivalent to $5.00 per thousand feet for all logs, except wood logs, cut and removed from the land during the preceding calendar month. The purchase contract provides that no loss or destruction to any part or all of the property covered by the contract shall give ground for the termination of the contract or relieve purchaser (the petitioner) in whole or in part from any obligation imposed (meaning the obligation to pay the full amount of the note). It further provides that in the event of default that the Petermans may declare the whole amount owing due and bring suit therefor. A full and true copy of said note and contract are marked Exhibits B and C, respectively, attached to and made a part of this petition.

(B) That prior to the purchase of said timberland, a cruise was made of the timber thereon which showed in excess of 115 million feet of timber on said land suitable for making commercial plywood and saw mill logs.

(C) That as a part of the purchase transaction, and to assure Peterman Manufacturing Company that substantial monthly payments would be made on said note, petitioner entered into a contract with Peterman Manufacturing Company as loggers authorizing and requiring them to cut and remove all of the merchantable timber from said land at the rate of from twenty to twenty-five million feet per year and required them to commence logging in

October, 1943, and be in full operation by February, 1944.

* * *

(I) If the deficiency proposed by the Commissioner—$19,925.35—is affirmed, it will result in an "overassessment" of income tax against the petitioner for the calendar year 1944, of $9,321.80.

* * *

Wherefore, petitioner prays that this Court may hear the proceedings and set aside and vacate the whole of the deficiency determined or proposed by the Commissioner. But, in the alternative, if said deficiency is affirmed in whole or in part that the overassessment for the year 1944, be credited against or deducted from the same.

That the petitioner have such other, further and different relief as the Court may determine it is entitled to in the proceedings.

OREGON-WASHINGTON
PLYWOOD COMPANY,
Petitioner,

By /s/ HARRY T. NICOLAI,
President.

Duly verified.

Received and filed March 19, 1952, T.C.U.S.

Served March 20, 1952.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

(1) Admits the allegations contained in paragraph (1) of the petition.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits that the tax in controversy is a deficiency in excess profits tax for the calendar year ending December 31, 1944, in the amount of $19,-925.35. Denies the remaining allegations contained in paragraph (3) of the petition.

(4) (A) to (F), inclusive. Denies that the respondent committed any error in determining the deficiency as set forth in the notice of deficiency from which the appeal is taken, and specifically denies the allegations of error contained in subparagraphs (A) to (F), inclusive, of paragraph (4) of the petition.

(5)(A). Admits that the basis for the deficiency is respondent's reduction of the excess profits tax credit claimed by petitioner in its return, in that respondent disallowed as "borrowed, invested capital" amounts payable by petitioner under a timber purchase contract with the Peterman Manufactur-

ing Company and T. A. Peterman. Admits that copies of certain instruments executed in connection with said purchase are marked Exhibits B and C, respectively, and attached to the petition. Denies the remaining allegations contained in paragraph (5)(A) of the petition.

(B) For lack of sufficient information upon which to base an opinion as to the truth or correctness of the allegations contained in paragraph (5)(B) of the petition, the same are denied.

(C) Denies the allegations contained in paragraph (5)(C) of the petition.

(D), (E) and (F). Denies the allegations contained in paragraphs (5)(D), (E) and (F) of the petition.

(G) Admits that petitioner protested the deficiency proposed by the Commissioner and had various conferences with representatives of the commissioner. Denies the remaining allegations contained in paragraph (5)(G) of the petition.

For further answer to paragraph (5)(G) respondent alleges that the adjustments cited as error in paragraphs (4) (D), (E) and (F) and paragraph (5)(G) of the petition do not affect petitioner's tax liability and are not an issue in determining the deficiency in this proceeding.

(H) Admits that the excess profits tax net income of the petitioner for the taxable years 1944 and 1945 and the adjustments made to petitioner's income per the returns are as set forth in Exhibit D attached to the petition. Admits that the compu-

tation of liability of petitioner for excess profits tax for the years 1944 and 1945 are as shown in said Exhibit D. Denies the remaining allegations contained in paragraph (5)(H) of the petition.

(I) Admits that if the deficiency in excess profits tax proposed by the Commissioner in the amount of $19,925.35 is affirmed, it will result in an overassessment in income tax against the petitioner for the calendar year 1944 in the amount of $9,321.80. Denies the remaining allegations contained in paragraph (5)(I) of the petition.

(6) Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of deficiency be approved.

/s/ MASON B. LEMING,
Acting Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

WILFORD H. PAYNE,
District Counsel.

DOUGLAS L. BARNES,
JOHN H. WELCH,
Special Attorneys, Bureau of Internal Revenue.

Received and filed May 5, 1952, T.C.U.S.

Served May 12, 1952.

The Tax Court of the United States

Docket No. 39553

OREGON-WASHINGTON PLYWOOD COMPANY, an Oregon Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Promulgated July 10, 1953

FINDINGS OF FACT AND OPINION

Excess Profits Credit—Borrowed Invested Capital. Held, that a land purchase contract and so-called note executed pursuant thereto were conditional and that the obligation under such instruments was not an outstanding indebtedness evidenced by either a note or a mortgage, within the meaning of section 719 (a) (1), Internal Revenue Code.

For the Petitioner:

GEORGE J. PERKINS, ESQ.

For the Respondent:

JOHN H. WELCH, ESQ.

The respondent has determined an excess profits tax deficiency of $19,925.35 against the petitioner for the calendar year 1944.

The issue presented is whether, in determining the excess profits credit based upon the invested

capital method, the petitioner's obligation for the balance due under a contract for purchase and sale of timberlands and an alleged promissory note executed pursuant to that contract, constitutes an outstanding indebtedness evidenced by a note or mortgage which may be included in borrowed capital for the years 1944 and 1945, within the meaning of section 719 (a) (1), Internal Revenue Code.

It is stipulated that, if the Court finds for the petitioner on the issue involved, the amount claimed as representing 50 per cent of the average daily borrowed capital as set forth in each of the petitioner's excess profits tax returns for 1944 and 1945, respectively, is correct and there is no deficiency in excess profits tax for 1944. It is further stipulated that if the deficiency involved herein is sustained, it will result in an overassessment of $9,321.80 in income tax for the year 1944.

This proceeding has been submitted upon the pleadings and a stipulation of facts including numerous exhibits made a part thereof.

Findings of Fact

The stipulated facts are so found and included herein by reference.

The petitioner is an Oregon corporation which, during the years material herein, was qualified to transact business in the State of Washington, as a foreign corporation. The petitioner's income and excess profits tax returns for the taxable years 1944 and 1945 were filed with the collector of internal revenue for the district of Washington.

At all times material to this proceeding the petitioner owned and operated a plywood manufacturing plant at Tacoma, Washington, and in that vicinity there was a scarcity of raw material, namely, peeler logs.

On July 30, 1941, T. A. Peterman acquired title by deed to approximately 3,500 acres of timberland in Tillamook County, Oregon, and he had not conveyed or encumbered the same prior to the execution of a contract of purchase and sale dated August 30, 1943, hereinafter mentioned. That tract of timberland was cruised in December, 1940, and January, 1941, and the timber cruiser's report showed an estimated total of 109,528,000 feet of merchantable timber. The tract contained a large amount of dead timber which had been killed by a forest fire and the time for using the dead timber as peeler logs was limited. During 1943 and until November 16, 1944, T. A. Peterman, Katherine Peterman and Gladys Peterman were partners doing business under the firm name of Peterman Manufacturing Company which owned a large amount of logging equipment and maintained a logging organization in the area of the above-mentioned tract of timberland. The petitioner had no logging equipment or facilities for logging timber.

On August 30, 1943, T. A. Peterman and his wife as owners and the petitioner as purchaser executed a contract of purchase and sale of the above-mentioned 3,500-acre tract of timberland in Tillamook County, Oregon. The agreed purchase price was

$500,000 payable $25,000 on date of the contract, $75,000 on or before September 30, 1943, and the balance of $400,000 "evidenced by a note made payable" to Peterman Manufacturing Company and delivered thereto on or before September 30, 1943. Payments on the note, plus accrued interest at the rate of three per cent per annum on deferred balances, were due on the 15th day of each month beginning November 15, 1943, on the basis of $5 per thousand feet, commercial log scale, cut and removed by the purchaser during the previous month. If the purchaser defaulted in the monthly payments logging operations were to cease until the default was made good. The purchaser agreed, inter alia, that it would conduct its operations on the lands in a good and workmanlike manner in accordance with the best methods and usages practiced in the Douglas Fir area and the Oregon laws and regulations; that it would pay all taxes and assessments levied upon the lands; that it would scale the logs cut and removed and keep accurate records; and that no loss or destruction of, nor injury or damage to any part or all of the property from fire, wind, or other element or casualty whatsoever would give ground for the termination or rescission of the contract or relieve the purchaser of its obligations thereunder. The contract further provided that "time is of the essence of this contract and each and every portion thereof" and that in case of purchaser's default in payments or performance of other terms of the contract and after certain notice, the owners may elect to declare the

contract at an end with all payments and improvements on the property forfeited as liquidated damages, or the owners may elect to declare all unpaid sums plus accrued interest immediately due and payable and bring suit therefor. Further, the owners reserved title to the lands and timber thereon until complete performance of the contract by the purchaser but title to the logs passed to the purchaser as they were cut and removed from the land. Upon completion of the purchaser's obligations under the contract the owners agreed to execute and deliver a deed to the timberlands in fee simple with covenants of warranty and good commercial abstract or title insurance in a sum equal to the price paid for the land subject to certain existing record reservations and easements.

The petitioner made the cash payments totaling $100,000 required by the contract of August 30, 1943, and on September 30, 1943, delivered the following note as provided in that contract:

> Tacoma, Washington, September 30, 1943.
>
> $400,000.00
>
> As provided in an agreement dated August 30, 1943, the undersigned for value received promises to pay to the order of the Peterman Manufacturing Company the sum of Four Hundred Thousand Dollars ($400,000.00) in lawful money of the United States of America. Payments on this note plus accrued interest at the rate of 3% per annum on deferred balances shall be made on the 15th day of each month beginning November 15, 1943.

The basis of such principal payments to be $5.00 per thousand feet commercial log scale for all logs except wood logs cut and removed by purchaser or its agents during the previous calendar month as provided in the agreement between T. A. Peterman and Ida C. Peterman, owners, and Oregon-Washington Plywood Company, purchaser, dated August 30, 1943, covering certain timber lands in Tillamook County, Oregon.

OREGON-WASHINGTON PLYWOOD COMPANY,

By /s/ PHILIP GARLAND,
Vice President.

Attest:

/s/ MATHILDA M. BARRETT,
Secretary.

On September 18, 1943, the Peterman Manufacturing Company executed a written agreement with the petitioner whereby for certain agreed prices to be paid by the petitioner, the former agreed, inter alia, to furnish all equipment and labor and pay all costs for logging all merchantable timber on the above-mentioned 3,500-acre tract for the petitioner. The Peterman Manufacturing Company further agreed to log an annual average of from twenty to twenty-five million feet a year until all of the timber be logged from the tract, to commence shipping logs in October and to be in full production by February, 1944.

On September 30, 1943, the Peterman Manufac-

turing Company executed an additional agreement with the petitioner to purchase at certain prices all logs cut other than the fir peeler logs and certain fir sawmill logs needed by the petitioner.

T. A. Peterman died on November 16, 1944. Thereafter the surviving partners, the decedent's wife and executors of the decedent's estate, desired to be relieved of the agreements mentioned in the next two preceding paragraphs as to logging operations and the purchase of logs, and they were terminated by a cancelation agreement dated January 4, 1946, between the interested parties and the petitioner. Also, on January 4, 1946, the same interested parties and the petitioner executed an amendment to the above-mentioned contract dated August 30, 1943, whereby, inter alia, the balance of the purchase price of the said timberland of approximately $241,000 owing by the petitioner under the August 30, 1943, contract and September 30, 1943, note, would be paid as follows: a minimum payment of $5,000 on June 1, 1946, and the first of every succeeding month thereafter until the principal of the note was paid in full, plus additional payments "to be credited on the aforesaid note and contract" at the rate of $5 per thousand feet cut in excess of seven million feet during 1946 and twelve million feet during any subsequent calendar year. Furthermore, the interest provided for in the August 30, 1943, contract and note thereunder was expressly waived and it was agreed that no interest would be charged or collected "on the

balance owing on the aforesaid indebtedness or on said note." Except as so amended the August 30, 1943, contract remained in full force and effect.

On January 4, 1946, the petitioner entered into a contract with the firm of Yunker and Wiecks for the cutting of timber on the above-mentioned 3,500-acre tract.

The petitioner's records show that 90,933,000 feet of timber were logged from the land between August 30, 1943, and August 31, 1952. The petitioner's above-mentioned note for $400,000 dated September 30, 1943, was paid in full sometime prior to December 22, 1949, on which date the petitioner acquired legal title to the 3,500-acre tract of timberland by warranty deed from the heirs of T. A. Peterman.

Opinion

Tietjens, Judge:

The issue presented is whether under the facts herein the petitioner had, during the years 1944 and 1945, an "outstanding indebtedness" which was "evidenced by" a "note" or "mortgage" within the meaning of section 719 (a) (1), Internal Revenue Code.[1] If so, there is no dispute as to the amounts to be included in the petitioner's borrowed capital for those years.

The petitioner contends that, during 1944 and 1945, its obligation to pay the balance due on the agreed purchase price of timberland constituted an

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[1]Sec. 719. Borrowed Invested Capital.

(a) Borrowed Capital.—The borrowed capital for any day of any taxable year shall be determined

unconditional outstanding indebtedness which was evidenced by a promissory note secured by a land purchase contract which was a form of mortgage under the laws of Oregon. The petitioner further contends that title to the land was retained by the seller only as security and that, in Oregon, the land purchase contract created a lien on the property equivalent to the common form of mortgage.

The respondent contends that the transaction involved herein did not create an outstanding indebtedness evidenced by either a note or a mortgage within the meaning of section 719 (a) (1), supra. He argues that the petitioner's obligation was conditional under the terms of an executory and bilateral agreement, that the agreement was a conditional land contract with the seller retaining title and was not a "mortgage" or even equivalent to one, and, further, that the instrument promising to pay $400,000 was not a "note" because there was no due date and the monthly payments called for were to be made on the basis of the quantity of

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as of the beginning of such day and shall be the sum of the following:

> (1) The amount of the outstanding indebtedness (not including interest) of the taxpayer which is evidenced by a bond, note, bill of exchange, debenture, certificate of indebtedness, mortgage, or deed of trust, plus,
>
> * * *

(b) Borrowed Invested Capital.—The borrowed invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be an amount equal to 50 per centum of the borrowed capital for such day.

timber cut and removed by the petitioner. The respondent argues that the situation in the instant case is almost identical to that in Consolidated Goldacres Co. v. Commissioner, 165 F. 2d 542, affirming 8 T.C. 87, certiorari denied 334 U.S. 820. Among other cited cases the respondent also relies heavily upon Bernard Realty Company v. United States, 188 F. 2d 861, reversing 92 F. Supp. 805; and Journal Publishing Company, 3 T.C. 518, to support his position that his determination should be sustained.

In each of the above-cited cases the taxpayer's obligation to pay a sum of money was evidenced by a written contract. In the first two cited cases it was held that the contract did not constitute either a "mortgage" or a "note" and in the third cited case it was held that the contract did not constitute a "note" or otherwise qualify as evidence of indebtedness, within the intent of Congress in enacting section 719 (a) (1), supra. In the instant case one distinguishing circumstance not involved in the cited cases is that in addition to the land purchase contract the petitioner executed an instrument purporting to be a promissory note. However, that factual distinction does not obviate the applicability of the reasons and conclusions set forth in the cited cases which we think determine the instant controversy.

The concept of including in invested capital certain amounts of outstanding indebtedness as borrowed capital and the restricted character of the permissible evidence of such indebtedness which

Congress has prescribed in section 719 (a) (1), has been heretofore fully discussed in the above-cited cases and Flint Nortown Theatre Co., 4 T.C. 536; West Construction Co., 7 T.C. 974; Canister Co., 7 T.C. 967, affd. 164 F 2d 579; and C. L. Downey Co., 10 T.C. 837, affd. 172 F. 2d 810. There is no need here for further discussion along that line.

In the instant case the agreement of August 30, 1943, wherein the seller retained title to the land and standing timber thereon until payment in full of the agreed purchase price by the petitioner, was a conditional land contract. The purchase price of $500,000 was payable $100,000 in cash and the balance during an indefinite period of time by monthly payments conditioned upon the quantity of timber cut and removed by the petitioner. In addition to the conditional monthly payments, there were numerous other conditions which the petitioner was required to meet in order to fulfill the terms of the contract. Default in any of those conditions gave the seller the option to declare the contract terminated and all payments forfeited as liquidated damages, or, declare the unpaid sums plus interest immediately due and payable and bring suit therefor. Under the contract the petitioner was obligated to pay the b a l a n c e of the purchase price but that obligation was not unconditional for at any time a breach of the terms and the seller's election to terminate the contract would have relieved the petitioner of any further liability. Even though the land contract may be the equivalent of a mortgage for certain remedial purposes

under the laws of Oregon, as contended by the petitioner, the controlling fact here is that the contract was conditional and therefore does not qualify as a "mortgage" within the meaning and for the purpose of section 719 (a) (1). A land contract or other conditional sales contract is not synonymous with and therefore may not be considered as a "mortgage" under that section. Consolidated Goldacres Co. v. Commissioner, supra, and Bernard Realty Company v. United States, supra.

The petitioner further contends that even if the contract fails to qualify as a "mortgage" the instrument executed as a note pursuant to the contract, is an entirely separate instrument which qualifies as a "note" under section 719 (a) (1). In our opinion, the so-called note must be read with its interrelated contract and when so read a close analysis of both instruments discloses that there was no unconditional promise to pay a certain sum of money on demand, or at a fixed or determinable future time. Journal Publishing Co., supra. While it is true that the so-called note "promises to pay to the order of" a payee the sum of $400,000 in money, it is also true that it is not payable on demand nor at any designated or ascertainable future time. The so-called note refers to the contract and incorporates language providing for monthly payments on the basis of the quantity of timber cut and removed by the petitioner and accordingly it is conditional. By its very terms the instrument purporting to be a note is payable in instalments, the

amounts of which are not fixed, and we do not agree with the petitioner's contention that the so-called note should be deemed payable in a reasonable time and if not so paid would become a demand note.

We conclude that the petitioner's obligation during the years 1944 and 1945 under the instruments involved herein, was not an outstanding indebtedness evidenced by a note or mortgage within the meaning of section 719 (a) (1), supra. The respondent's determination is sustained.

Decision will be entered for the respondent.

Served July 10, 1953.

The Tax Court of the United States
Washington

Docket No. 39553

OREGON-WASHINGTON PLYWOOD COMPANY, an Oregon Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion promulgated July 10, 1953, it is

Ordered and Decided: That there is a deficiency in excess profits tax for the calendar year 1944 in the amount of $19,925.35.

/s/ NORMAN O. TIETJENS,
Judge.

Entered July 21, 1953.

Served July 21, 1953.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties to this proceeding, through their respective counsel, that the following facts are true and may be accepted for purposes of determining the issue in controversy, reserving either party the right to present other and further evidence not inconsistent with the facts hereinafter set forth:

1. Petitioner is an Oregon corporation and was such during the calendar years 1944 and 1945. Petitioner was qualified during said years to transact business in the State of Washington as a foreign corporation, and owned and operated a plywood manufacturing plant at Tacoma, Washington. Petitioner's income and excess profits tax returns for the taxable years 1944 and 1945 were filed with the Collector of Internal Revenue for the District of Washington. The original returns may be offered

by respondent and received in evidence and identified as follows:

Exhibit A—Excess Profits Tax Return—1944
Exhibit B—Excess Profits Tax Return—1945
Exhibit C—Income Tax Return —1944
Exhibit D—Income Tax Return —1945

2. The notice of deficiency (a copy of which is attached to the petition and marked Exhibit A) was mailed to the petitioner on December 27, 1951. In this notice, respondent determined a deficiency in excess profits tax in the amount of $19,925.35 for the calendar year 1944. The deficiency is based upon the disallowance by respondent of certain amounts claimed by petitioner as borrowed capital for the years 1944 and 1945. Petitioner, on its returns for said years, took into account fifty per cent of the daily average, in computing its excess profits credit based upon the invested capital method of computing the said credit.

3. The amounts of the claimed borrowed capital so disallowed were $171,974.05 for 1944 and $130,746.55 for 1945. These amounts are fifty per cent of the average daily balance claimed by petitioner under the terms and conditions of agreements entered into between it and T. A. and Ida C. Peterman, husband and wife, and with the Peterman Manufacturing Company, hereinafter further described.

4. The issue in controversy is dependent upon the determination of the legal effect of an agreement entered into between petitioner and Peterman

Manufacturing Company, and an agreement between petitioner and T. A. and Ida C. Peterman, husband and wife, and whether these agreements create and evidence borrowed capital within the meaning of the Internal Revenue Code. If the Court orders that they do, Petitioner's computations of its claimed average daily balances of borrowed capital are correctly set forth in its excess profits tax returns identified herein as Exhibits A and B and there would be no deficiency in excess profits tax. If they do not, the deficiency in excess profits taxes is correctly stated in the statutory notice of deficiency. If the deficiency in excess profits tax determined by the respondent in the amount of $19,925.35 is affirmed, it will result in an overassessment in income tax for the year 1944 in the amount of $9,321.80.

5. There may be offered and received in evidence by the petitioner an agreement between petitioner, as one c o n t r a c t i n g party, and T. A. Peterman and Ida C. Peterman, husband and wife, as the other contracting parties, relating to certain timber lands located in the State of Oregon which may be identified as Exhibit 1. There may be offered and received in evidence an instrument which is identified as Exhibit 2 and a letter signed by T. A. Peterman dated October 18, 1943, which may be admitted in evidence and identified as Exhibit 3. The execution of Exhibits 1 and 2 and the signing and delivery of Exhibit 3, which is a letter, are admitted and may be received in evidence for the

purposes of determining the issue in controversy. T. A. Peterman acquired title to the land, described in Exhibit 1, by deed on July 30, 1941, and had not conveyed or encumbered the same prior to the time the aforesaid agreements were executed. The above are the instruments referred to in the preceding paragraph.

6. T. A. Peterman, Katherine Peterman and Gladys Peterman were partners during 1943 and during 1944 until the death of T. A. Peterman on November 16, 1944. The partnership did business under the firm name of Peterman Manufacturing Company. A copy of an agreement between petitioner and Peterman Manufacturing Company may be offered in evidence by petitioner and identified as Exhibit 4. Respondent admits that this is a true and correct copy of the original.

7. Petitioner was engaged in the manufacture and sale of plywood at the time said agreements were made. The raw material for plywood is peeler logs. A scarcity of peeler logs existed in the vicinity of Tacoma, Washington. The agreement, identified as Exhibit 1, was made to obtain a supply of peeler logs.

8. The land described in Exhibit 1, contained a large amount of dead timber, which had been killed by a forest fire several years prior to the date of the agreement. The time for using the dead timber as peeler logs was limited. Petitioner's records show that 90,933,000 feet of timber have been logged from the land between August 30, 1943, and

August 31, 1952. Between December, 1940, and January, 1941, a cruise was made on the land by one F. A. Veitschegger, whose cruise report showed an estimated total of 109,528,000 feet of merchantable timber on the land.

9. T. A. Peterman died during November, 1944. The surviving partners of T. A. Peterman, and his executors desired to be relieved of the agreement identified as Exhibit 4, and the same was cancelled as indicated by Exhibit 6, hereinafter referred to. Petitioner negotiated with others and subsequently entered into agreements dated January 4, 1946, copies of which may be offered in evidence and received and identified as Exhibits 5, 6 and 7. Exhibit 6 refers to an understanding in the form of a letter dated September 27, 1943, which may be admitted in evidence and identified as Exhibit 8.

10. Peterman Manufacturing Company owned a large amount of logging equipment and maintained a logging organization in the area of the timber described in Exhibit 1. Petitioner had no logging equipment or facilities for logging timber. The agreement identified as Exhibit 1 was executed by the parties to the same on August 30, 1943, and Exhibit 2 was signed and delivered by petitioner September 30, 1943. Both instruments relate to the same transaction. Prior to the time petitioner signed and delivered the instrument described as Exhibit 2, it had paid to T. A. Peterman, pursuant to the agreement identified as Exhibit 1, $100,000 in money.

11. Petitioner acquired legal title to the timber land described in Exhibit 1 by warranty deed from the heirs of T. A. Peterman on December 22, 1949, and petitioner had paid the amount stated in Exhibit 2 prior to this time, with the exception of interest, which was not paid after January 1, 1944. A copy of a letter from George Rakins, accountant for T. A. Peterman, to Philip Garland, Secretary of petitioner at the time, referring to "Al" who is T. A. Peterman, describes the circumstances for waiving the interest, may be admitted in evidence as respondent's Exhibit E.

/s/ GEORGE J. PERKINS,
Counsel for Petitioner.

/s/ CHARLES W. DAVIS,
Chief Counsel, Bureau of Internal Revenue.

[All of the exhibits mentioned in the Stipulation of Facts were received in evidence by the Tax Court.]

PETITIONER'S EXHIBIT 1

Agreement

T. A. Peterman and Ida C. Peterman, husband and wife, of Tacoma, Washington, hereinafter called Owners, hereby and herein agree to sell to Oregon-Washington Plywood Company, an Oregon Corporation, having its principal office and place of business at Tacoma, Washington, hereinafter called Purchaser, and the Purchaser hereby and herein

agrees to buy from the Owners, all the following described timberlands in Tillamook County, Oregon, listed in Exhibit A hereto attached and by this reference made a part hereof, upon the following mutually agreed terms and conditions:

1. That the Purchaser will pay to the Owners at Tacoma, Washington, for said timberlands, the sum of Five Hundred Thousand Dollars plus interest at 3 per cent per annum on deferred balances, payable as follows:

(a) $25,000.00 on the date hereof,

(b) $75,000.00 on or before September 30, 1943,

(c) The balance of the purchase price in the sum of Four Hundred Thousand Dollars ($400,000.00) shall be evidenced by a note made payable to the Peterman Manufacturing Company and placed in their hands on or before September 30, 1943. Payments on this note, plus accrued interest at the rate of three per cent (3%) per annum on deferred balances, shall be made on the Fifteenth day of each month beginning with November 15, 1943. The basis of such principal payments to be Five Dollars ($5.00) per thousand feet, commercial log scale, for all logs except wood logs cut and removed therefrom by purchaser or its agents during the previous calendar month. Such monthly payments to be accompanied by a written report showing the commercial log scale of logs so cut and removed.

If the Purchaser shall fail to make the payments above provided for on the 15th day of any month, and within five (5) days after the mailing of a

written demand therefor, addressed to it at Tacoma, Washington, it shall cease all logging operations upon any of the lands or in any of the timber hereinabove described, and shall not again resume such logging operations until it shall have made good the amount of such default, with interest thereon at the rate of 3% per annum from the date when such stumpage payment became due, and shall have paid any and all costs of whatsoever kind or nature, including attorney's fees, which the owner may have incurred or been put to in order to compel the Purchaser to refrain from and cease logging operations, the Purchaser hereby covenanting and agreeing that in such event it will, as a condition precedent to its right to resume logging operations, make good any and all defaults and stumpage payments, with interest, as above expressed, and will pay any and all costs incurred by the Owner, including attorney's fees.

2. That the Purchaser will conduct its operations hereunder in a good and workmanlike manner and in accordance with the best methods and usages practiced in the Douglas Fir area; that it will comply with any and all laws and regulations of the State of Oregon relating to safety appliances and equipment, fire supervision, patrol and equipment, and slash disposal; that it will pay before delinquency any and all taxes and assessments levied and assessed upon said lands beginning with those first becoming due and payable in November, 1943; that logs cut and removed shall be scaled by a scaler satisfactory to both parties; that it will keep accu-

rate records and accounts of its operations under this contract, and that the Owners shall have the right, by their agents or attorneys, at any and all times, to examine such records, or to take a copy and account of the logging operations of the Purchaser to the end that they may check and determine the amount of timber cut from time to time and the payments due or to become due in consequence thereof; that it will protect and save harmless the Owners from any and all claims of any kind and nature occasioned by or arising out of the conduct of its operations hereunder; that no loss or destruction of, nor injury or damage to any part or all of the property covered hereby, from fire, wind or other element or casualty whatsoever shall give ground for the termination or rescission of this contract or relieve the Purchaser in whole or in part from any of the obligations hereby imposed on or herein assumed by it; that all payments which the Purchaser is required hereunder to make to the Owners, shall be made payable and paid, to the Peterman Manufacturing Company, address Post Office Box 1576 in Tacoma, Washington, until otherwise specified in writing; that any buildings or improvements which shall hereafter be placed on said lands by the Purchaser, shall not be removed therefrom prior to completion of this agreement; that it will not assign this agreement, or any interest therein, without the written consent of Owners to do so being first had and obtained.

3. Any notice required hereby or provided for herein may be given either by the delivery of the

same to the Owners or to any officer of the Purchaser in person, as the case may be, or by mailing the same to the party to whom such notice is to be given, in sealed envelope, with the postage thereon fully prepaid, directed to such party at the post office address below given, and such notice shall be deemed complete when delivered or when deposited in the United States mails, as the case may be.

4. The time is of the essence of this contract and each and every portion thereof. In case the Purchaser shall make default, (a) in the payment of any sum owing by it to the Owners on the date the same becomes due, and such default shall continue for ten (10) days after written notice thereof be given by the Owners to the Purchaser, or, (b) in performance of any other term, condition or provision contained in this agreement, and such default shall continue for thirty (30) days after written notice thereof be given by the Owners to the Purchaser, then and in either or any of such events the Owners may in their option either elect to declare this contract at an end and all rights of the Purchaser thereunder terminated, in which event all payments theretofore made by the Purchaser, as well as all improvements made upon said lands, shall be forfeited to the Owners and become and remain their property absolutely as liquidated damages; or, the Owners may declare all sums unpaid upon said contract, together with all interest accrued to the date of the expiration of such notice, immediately due and payable, and shall be entitled upon expiration of said ten-day period or said

thirty-day period, as the case may be, to bring suit therefor without further or other notice or demand.

5. The Owners reserve unto themselves, until complete performance hereof by the Purchaser, title to said lands and the timber thereon. But when logs or other forest products shall be removed from said lands, the title to such logs or forest products shall then pass to the Purchaser and the sale thereof be deemed absolute, and the Owners shall have, in addition to remedies provided for herein, such stumpage lien or other remedy in connection therewith as is now or may hereafter be given by the laws of the State of Oregon.

6. When the Purchaser shall have completed performance of the obligations herein assumed by it, and request a deed to the lands included herein, the Owners shall promptly execute and deliver to Purchaser a deed conveying to it said lands in fee simple with covenants of special warranty, save and except taxes and incumbrances, if any, created by the acts or omissions of the Purchaser hereunder, existing reservations of record and easements for telephone and telegraph lines, public roads and trails; provided, however, that if the Owners' title to said lands should fail, they shall be liable only for the sums paid hereunder by Purchaser, and no more, plus interest at 3% per annum thereon; should such title to a portion of said lands fail, said liability shall be limited to the value of such portion set out in the records of the Owners relating thereto.

Provided, should title in the Owners herein

named to any of said land fail after the Purchaser has cut or removed any timber therefrom, said Owners will pay to the Purchaser any damage which it may sustain on account of having cut or removed the timber from said land.

When said land has been paid for, Owners will furnish Purchasers with good commercial abstract or title insurance in a sum equal to the price paid for said land showing good marketable title in the Owners subject only to the exceptions herein above mentioned.

It is understood the Owners will pay any revenue or tax stamps lawfully required on the deeds to said property.

In Execution Hereof, the Owners have hereunto affixed their hands and seals, and the Purchaser has caused its corporate name and seal to hereunto be subscribed and affixed and this agreement to be executed in duplicate originals by its Officers thereunto duly authorized this 30th day of August, 1943.

Owners:

/s/ T. A. PETERMAN,

/s/ IDA C. PETERMAN.

Purchaser:

OREGON-WASHINGTON
PLYWOOD COMPANY.

/s/ HARRY T. NICOLAI,
President.

Attest:

/s/ MATHILDA M. BARRETT,
Secretary.

State of Washington,
County of Pierce—ss.

This Is to Certify, that on this 30th day of August, 1943, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came T. A. Peterman and Ida C. Peterman, his wife, of Tacoma, Washington, and to me known to be the individuals described in and who executed the within and foregoing agreement, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate above written.

[Seal] /s/ J. P. PATTEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

State of Washington,
County of Pierce—ss.

This Is to Certify, that on this 30th day of August, 1943, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came Harry T. Nicolai and Matilda Barrett, to me known to be the President and Secretary, respectively, of Oregon-Washington Plywood Company, a corporation, that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and

voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed thereunto is the corporate seal of said corporation.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal] /s/ ROBERT M. LEE,
Notary Public in and for the State of Washington,
Residing at Tacoma.

EXHIBIT A

List of Timberlands in Tillamook County, Oregon, referred to in, and made a part of, that certain contract dated August 30, 1943, by and between T. A. Peterman and Ida C. Peterman, Owners, and Oregon-Washington Plywood Company, an Oregon Corporation, Purchasers.

The South half of the Northeast quarter (S½ of NE¼), the Southeast quarter of the Northwest quarter (SE¼ of NW¼), Lots 2, 3, and 4, the East half of the Southwest quarter (E½ of SW¼), and the Southeast quarter (SE¼), of Section 31; the Southwest quarter (SW¼) of Section 32; all in Township 2 South, Range 7 West of the Willamette Meridian;

The Southeast quarter (SE¼) of Section 25; all of Section 26; the East half (E½), and the East half of the West half (E½ of W½), of Section 27; the Northeast quarter (NE¼) of Section 34; and

all of Section 36; All in Township 2 South, Range 8 West of the Willamette Meridian;

The Northwest quarter (NW¼) of Section 5; and all of Section 6; all in Township 3 South, Range 7 West of the Willamette Meridian;

The North half of the North half (N½ of N½), being Lots 1, 2, 3 and 4, and the South half of the North half (S½ of N½), of Section 2; and the Northwest quarter (NW¼) of Section 12; all in Township 3 South, Range 8 West of the Willamette Meridian.

PETITIONER'S EXHIBIT 2

Tacoma, Washington, September 30, 1943.

$400,000.00

As provided in an agreement dated August 30, 1943, the undersigned for value received promises to pay to the order of the Peterman Manufacturing Company the sum of Four Hundred Thousand Dollars ($400,000.00) in lawful money of the United States of America. Payments on this note plus accrued interest at the rate of 3% per annum on deferred balances shall be made on the 15th day of each month beginning November 15, 1943.

The basis of such principal payments to be $5.00 per thousand feet commercial log scale for all logs except wood logs cut and removed by purchaser or its agents during the previous calendar month as provided in the agreement between T. A. Peterman and Ida C. Peterman, owners, and Oregon-Washington Plywood Company, purchaser, dated August

30, 1943, covering certain timber lands in Tillamook County, Oregon.

[The word "Cancelled" appears in longhand, over the typewritten matter of the foregoing paragraphs, on the original exhibit.]

[Seal] OREGON-WASHINGTON PLYWOOD COMPANY,

By /s/ PHILIP GARLAND,
Vice-President.

Attest:

/s/ MATHILDA M. BARRETT,
Secretary.

Assigned on September 30, 1947, without recourse or warranty, an undivided one-half to Ida Christine Peterman, and the other undivided one-half to Gladys Peterman.

PETERMAN MANUFACTURING COMPANY, a Partnership.

By /s/ KATHERINE T. PETERMAN,
General Partner;

By /s/ GLADYS PETERMAN,
General Partner;

ESTATE OF T. A. PETERMAN,
Deceased,
General Partner;

By /s/ GEORGE N. RAKNES and

/s/ IDA CHRISTINE PETERMAN,
Duly Qualified Non-Intervention Co-Executors.

Filed October 17, 1952.

PETITIONER'S EXHIBIT No. 9

Excerpts From Minutes of Special Meeting of Directors Oregon-Washington Plywood Company Held November 4th, 1943

* * *

Mr. Nicolai explained fully to the Directors the contract which had been entered into between T. A. Peterman and the Oregon-Washington Plywood Company, for the acquisition of timber and timberlands near the Tillamook area in Oregon, and submitted for their study and consideration contract negotiated for the purchase of those timberlands, the contract whereby Mr. Peterman agreed to log these lands for the Oregon-Washington Plywood Company, and the contract whereby he agreed to repurchase from the Oregon-Washington Plywood Company such reject and sawmill logs as the Company was not able to use in its own operation. He also submitted for the Director's examination copy of a note dated September 30, 1943, in the sum of $400,000.00, which note, together with advanced cash payments already made, would complete the payment for said timber and timberlands.

After careful study of all of these documents, it was moved * * * and seconded * * * that the Directors approve these contracts in full as submitted, and on roll-call the Directors unanimously did approve these contracts as executed.

* * *

/s/ PHILIP GARLAND,
Acting Secretary of Meeting.

Admitted in evidence October 17, 1952.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Oregon-Washington Plywood Company, an Oregon corporation, respectfully petitions for review by the United States Court of Appeals for the Ninth Circuit, of the decision in the above-entitled proceedings of the Tax Court of the United States, by Honorable Norman O. Tietjens, one of the judges of said Court, entered July 21, 1953, determining that there is a deficiency in the excess profits tax of the petitioner for the calendar year 1944, in the amount of $19,925.35, and Alleges:

Nature of Controversy

The Commissioner of Internal Revenue determined, and gave notice to petitioner of a deficiency in the excess profits tax of the petitioner for the calendar year 1944, in the amount of $19,925.35. The notice stated that if the deficiency is sustained it would result in overassessment in the income tax of petitioner for the same year of $9,321.80. The Tax Court was petitioned to redetermine the alleged deficiency. It sustained the determination of the Commissioner.

The basis for the alleged deficiency is the Commissioner's refusal to allow credit taken by the petitioner for 50 per cent of its borrowed capital, evidenced by a promissory note given by petitioner to Peterman Manufacturing Co., and secured by a

purchase and sales contract of timberland situated in Tillamook County, Oregon. 50% of the amount owing on said note and contract in the year 1944, was $171,974.05 and in the year 1945, $130,746.55. The Commissioner contended (and was sustained by the Tax Court) that said contract and note did not create, and was not evidence of, an unconditional obligation of the petitioner to pay any specific amount, and that the petitioner could not take credit for said indebtedness or any part of it as borrowed invested capital in the computation of its excess profits tax in the year 1944. Petitioner contends that said purchase and sales contract was in effect a real estate mortgage under the laws of the State of Oregon, to secure the debt owing for the purchase price of timberland; that both said mortgage and note evidenced an unconditional obligation of the petitioner to pay Peterman Manufacturing Co., or order $400,000.00 and that it rightfully took credit for 50 per cent, of the amount owing thereon in the years 1944 and 1945 in computing its excess profits tax for the calendar year 1944, and that there is no deficiency in its excess profits tax for that year.

Venue

Petitioner is now and was during all of the calendar years 1944 and 1945, an Oregon corporation. During all of the years 1944 and 1945, petitioner owned and operated a plywood plant and maintained a general office and place of business at Tacoma, in Pierce County, State of Washington,

and was qualified to transact business as a foreign corporation in the State of Washington. For the calendar years 1944 and 1945, it filed its income and excess profits tax returns with and paid its income and excess profits tax to the U. S. Collector of Internal Revenue at Tacoma, Washington.

Assignment of Error

The Tax Court erred in the following particulars:

(1) In concluding and determining that said purchase and sales contract of timberland situated in the State of Oregon, which was executed by petitioner as vendee and T. A. Peterman and wife, as vendors was not, under the laws of the State of Oregon, in effect a real estate mortgage to secure the payment of the promissory note given by petitioner to Peterman Manufacturing Co., for the sum of $400,000.00, and in concluding and determining that neither said note or contract evidenced an unconditional obligation of the petitioner to pay the full sum of $400,000.00 or any specific amount.

(2) In concluding and determining that said contract and note did not create and were not evidence of borrowed invested capital of the petitioner within the meaning of Section 719 (a) (1) of the Internal Revenue Code in effect in the calendar years 1944 and 1945, and that petitioner in computing its excess profits tax for the calendar year 1944, did not have the legal right to take credit for 50 per cent of its borrowed invested capital evidenced by the aforesaid promissory note and contract.

(The latter in effect a real estate mortgage to secure payment of said note.)

(3) By determining a deficiency in the excess profits tax of the petitioner for the calendar year 1944, in the amount of $19,925.35, or for any amount.

(4) By not determining and adjudging that the aforesaid contract and promissory note created and evidenced an unconditional obligation of the petitioner to pay to the Peterman Manufacturing Co., or order, the full sum of $400,000.00, and that 50 per cent of the average amount owing thereon during the calendar years 1944 and 1945 was rightfully and legally used by the petitioner as credit for borrowed invested capital in computing its excess profits tax for the calendar year 1944.

(5) In not determining and adjudging that there was no deficiency in petitioner's excess profits tax for the calendar year 1944, and in not vacating the determination of the Commissioner.

Prayer

Petitioner prays that the aforesaid decision of the Tax Court, and the proceedings appertaining to same, be reviewed by the United States Court of Appeals, for the Ninth Circuit. That said decision and the order entering the same, be reversed. That the Appellate Court determine there is no deficiency in the petitioner's excess profits tax for the

calendar year 1944, or at all, and that the Appellate Court grant petitioner such additional and different relief as the facts and the law may justify.

OREGON-WASHINGTON PLYWOOD COMPANY,

By /s/ DEAN M. SEAMING,
Vice-President.
Petitioner.

Duly Verified.

Affidavit of Service by Mail attached.

Filed September 18, 1953, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers and proceedings, (including respondent's exhibits A thru E, petitioner's exhibits 1 thru 8, attached to stipulation of facts, and petitioner's exhibit 9, admitted in evidence) as called for by the Designation of Contents of Record on Review on file in my office as the original and complete record in the proceeding before the Tax Court of the United States entitled: "Oregon-Washington Plywood Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 39553," and in which the petitioner in the Tax

Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 12th of October, 1953.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 14084. United States Court of Appeals for the Ninth Circuit. Oregon-Washington Plywood Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court Court of the United States.

Filed October 19, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 14084

OREGON-WASHINGTON PLYWOOD COMPANY, an Oregon Corporation,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

POINTS ON WHICH PETITIONER WILL RELY

In presenting the above-entitled cause to the above-entitled Court, petitioner will rely on the following:

Points

(1) The Tax Court misinterpreted the legal effect of the purchase and sales contract between T. A. Peterman and wife as vendors, and the petitioner as vendee, designated as exhibit 1 in the stipulation, and the note signed by the petitioner in connection therewith, designated in the stipulation as exhibit 2, and the other facts pertaining to said transaction found by The Tax Court.

(2) The Tax Court erred in the following particulars:

(a) In concluding and adjudging that said contract and note, considered alone or in connection

with the other facts found by The Tax Court, did not constitute and evidence an unconditional obligation of the petitioner to pay Peterman Manufacturing Co., the full sum of $400,000.00, and in concluding and adjudging that said indebtedness was not "borrowed invested capital" of the petitioner within the meaning of section 719 (a) (1) of the Internal Revenue Code, in effect during calendar year 1944.

(b) In concluding and adjudging that petitioner in computing its excess profits tax for the calendar year 1944, did not have the legal right to take credit for 50 per cent of the average amount owing on said indebtedness during that year, and its unused credits of 50 per cent of the average amount owing on said indebtedness during the calendar year 1945, as "borrowed invested capital," and by determining and adjudging a deficiency in petitioner's excess profits tax for the calendar year 1944, in the amount of $19,925.35, or for any amount.

(c) That by not determining and adjudging the aforesaid purchase and sales contract was, under the laws of the State of Oregon, in effect a real estate mortgage to secure the payment of the indebtedness owing thereunder, to wit, $400,000.00, and in not concluding and adjudging that said contract or mortgage and note, considered alone or in connection with other facts connected with the transaction which The Tax Court found to exist, created and evidenced an unconditional obligation of the petitioner to pay the full sum of $400,000.00, and by not determining and adjudging that petitioner was

within its legal right in taking credit for 50 per cent of the average amount it owed on said indebtedness during the calendar years 1944 and 1945 in computing its excess profits tax for the calendar year 1944.

(d) By not determining and adjudging that there was no deficiency in petitioner's excess profits tax for the calendar year 1944, and in not vacating the deficiency determined by the Commissioner of Internal Revenue.

/s/ GEORGE J. PERKINS,
Attorney for Petitioner.

[Endorsed]: Filed October 22, 1953.

No. 14084

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON PLYWOOD COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S BRIEF

GEORGE J. PERKINS,
1122 Board of Trade Building,
Portland 4, Oregon,
Attorney for Petitioner.
KENNETH W. GEMMILL,
Internal Revenue Bldg.,
Washington 25, D. C.
Attorney for Respondent.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-53

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No. 14084

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON PLYWOOD COMPANY,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITIONER'S BRIEF

Petition for review of decision of the Tax Court entered July 21, 1953, determining a deficiency in Petitioner's excess profits tax for the calendar year 1944, in the amount of $19,925.35. T. C. Docket No. 39553 (R. 24).

The letter R. and numbers immediately following refer to the printed transcript of record and page numbers.

PLEADINGS

Petition to Tax Court for redetermination of the Tax (R. 3).

Answer (R. 9).

ACTION OF THE TAX COURT

Findings of Fact (R. 12).

Opinion (R. 19).

Decision (R. 24).

JURISDICTION

Of the Tax Court:

Sec. 272, Internal Revenue Code, (U.S.C.A Tit. 26,) as amended Oct. 21, 1942, 56 Stat. 957 and Dec. 29, 1945, 56 Stat. 947, which provides if in the case of any taxpayer, the Commissioner determines there is a deficiency in respect to the tax imposed * * * the Commissioner is authorized to send notice of such deficiency to the taxpayer * * * Within ninety days after such notice is mailed * * * the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the tax. The statute gives the Tax Court jurisdiction to redetermine the correct amount of the deficiency.

Deficiency in the amount of $19,925.35 determined by the Commissioner December 27, 1951. Petition for redetermination of the deficiency filed with the Tax Court March 19, 1952. Served March 20, 1952 (R. 3-8). Answer C.I.R. filed with the Tax Court May 5, 1952. Served May 12, 1952 (R. 9-11). Stipulation of facts filed with trial judge of the Tax Court October 17, 1952 and docketed (R. 25).

Of this Court:

Sec. 1141, as amended May 24, 1949, 63 Stat. 107, and Sec. 1142, Internal Revenue Code (U.S.C.A., Tit. 26).

Rules 10 and 29 this Court.

Petitioner is and was during all the years 1944-1945 an Oregon corporation. During those years it owned and operated a plywood plant at Tacoma, Washington; maintained an office at that location; was qualified to transact business in the State of Washington, and filed its income and excess profits tax return with and paid its income and excess profits tax to the Collector of Internal Revenue at Tacoma.

Sec. 1141, as amended, supra, confers upon this Court jurisdiction to review the decision of the Tax Court and to affirm, modify or reverse the same.

Section 1142 provides the decision of the Tax Court may be reviewed by this Court if a petition for such review is filed by the taxpayer within three months after the decision is rendered.

Rule 10 of this Court provides that in case of appeal or review the Clerk of the trial Court or Commission shall transmit to the Clerk of this Court the original files designated by the respective parties as the record of appeal or review. Rule 29 this Court provides that a party applying for review of a decision of the Tax Court shall file his petition with the Clerk of said Court * * * and shall serve a copy thereof, with notice thereof, upon the opposite party * * * That the Clerk of the Tax Court shall, within 40 days from the filing of the petition, transmit the record to the Clerk of this Court.

Decision of the Tax Court entered July 21, 1953 (R. 24).

Petition for review by this Court and assignment of error, with proof of service by mail, filed with Tax Court September 18, 1953 (R. 42).

Notice of filing petition for review with proof of service filed with Tax Court September 18, 1953 (Docket entry).

Notice to Ass't. Gen'l Counsel, Internal Revenue Service, that petition for review was filed September 18, 1953, mailed October 1, 1953.

Designation contents of record on review, agreed to by Ass't. Gen'l. Counsel, I.R.S. filed with Tax Court October 7, 1953 (Docket entry).

Statement of points, with proof of service, filed with Tax Court October 8, 1953 (Docket entry).

Record of proceedings in Tax Court, filed with Clerk of this Court October 19, 1953 (R. 47).

Points relied upon by petitioner filed with Clerk this Court October 22, 1953 (R. 48).

Designation of record to be printed mailed to Clerk of this Court and copy mailed to Acting Chief Counsel, Internal Revenue Service, Washington 25, D.C., October 20, 1953.

STATEMENT OF THE CASE

This Court is asked to review and reverse the decision of the Tax Court entered July 21, 1953, determining a deficiency in Petitioner's excess profits taxes for the year 1944 in the amount of $19,925.35, and to adjudge that there is no deficiency.

The point in issue is whether the indebtedness of the Petitioner hereinafter stated which was incurred for the purchase of timberland was "borrowed invested capital" within the meaning of Section 719(a)(1) of the Internal

Revenue Code in effect in 1944. It is stipulated that if said indebtedness was borrowed invested capital of the Petitioner within the meaning of said provision of the Revenue Code, there is no deficiency in the Petitioner's excess profits tax for the year 1944. If it is not, the deficiency is correctly computed (4 Stip. R. 26, 27. Opinion R. 19). The material facts are stipulated (R. 25-40) and recited in the findings promulgated by the Tax Court (R. 13-19).

They are in substance:

(1) Petitioner is and was during all the years 1944 and 1945 an Oregon corporation; during the years 1944 and 1945 it owned and operated a plywood plant at Tacoma, Washington, and was qualified to transact business as a foreign corporation in the State of Washington. It filed its Federal income and excess profits tax returns with and paid its taxes to the Collector of Internal Revenue at Tacoma (1 Stip. R. 25).

(2) On August 30, 1943, Petitioner entered into a contract with T. A. Peterman and wife to purchase approximately 3500 acres of timberland in Tillamook County, Oregon, for which Petitioner agreed to pay $500,000.00; $25,000.00 to be paid on execution of the purchase contract; $75,000.00 on or before September 30, 1943, and the balance—$400,000.00, to be evidenced by a note of the Petitioner payable to the order of Peterman Manufacturing Company. The note to be signed and delivered on or before September 30, 1943. $25,000.00 was paid to apply on the purchase contract when the contract was signed, $75,000.00 paid, and the note

for $400,000.00 signed by Petitioner and delivered on September 30, 1943.

5 and 10 Stip. (R 27, 29), Exhibit 1 (R. 30) and Exhibit 2 (R. 39). Findings (R 14, 15).

(3) A cruise was made of the timber on the land purchased in December 1940 and January 1941. The cruiser estimated 109,528,000 feet of merchantable timber on the tract. Petitioner cut and removed from the tract approximately 90,933,000 feet prior to August 31, 1952. Prior to the purchase a large proportion of the timber had been killed by fire and the time for removal and use of same was limited. The timber was required for use in Petitioner's plant at Tacoma, Washington.

8 Stip. (R 28). Findings (R. 14).

(4) The purchase contract (Exhibit 1) provides among other things:

> That time is the essence of each and every portion thereof. That if the purchaser makes default in payment of any sums owing by it, and the default continues 10 days after written notice thereof, or makes default in the performance of any other term, condition or provision of the contract, and such default continues for 30 days after written notice thereof, the owners (the Vendors) may declare all sums unpaid on the contract, together with interest owing, immediately due and payable, and shall be entitled to bring suit therefor without further notice or demand. It gives the vendors the alternative right to declare a forfeiture in the event of a breach of covenant on the part of the purchaser. (Paragraph 4 of contract).
>
> That no loss or destruction of, nor injury or damage to, any part or all of the property covered hereby shall give ground for the termination or re-

cission of the contract, or relieve the purchaser (Petitioner) in whole or in part from any of the obligations imposed on or assumed by it. (Paragraph 2 of contract).

The contract reserves legal title to the timberland in the Vendors until complete performance by the Vendee (the Petitioner) but makes provisions for title to pass to the logs when cut and severed from the land. (Paragraph 5 of contract).

The Vendors are not required to give deed to the property until the purchaser (the Petitioner) has completed performance of all obligations assumed by it in the contract.

That when the land has been paid for, the Vendors will furnish abstract or title insurance showing good marketable title in the Vendors and will pay revenue or tax stamps for deed. (Paragraph 6 of contract). (R. 30-36).

(5) On October 18, 1943, T. A. Peterman, as a part of the purchase transaction, addressed a letter to Petitioner in which he stated that he and his wife owned all the land described in the contract, with the timber thereon, subject to some minor exceptions such as mineral rights, etc.; that the property was free from encumbrances, except taxes and fire patrol assessments for the years 1943-1944 (which had been assumed by the Petitioner), and that they, the Vendors, would not create any liens thereon and that the Petitioner might enter upon the land, cut and remove the timber so long as it made the payments and observed and performed the conditions of the sale contract.

5 Stip. (R. 27).

(6) T. A. Peterman acquired title to the land in 1941, and had not conveyed or encumbered the same

prior to the execution of the purchase contract (Exhibit 1).

5 Stip. (R. 28). Findings (R. 14).

(7) On September 18, 1943, Petitioner entered into a contract with Peterman Manufacturing Company by which it was agreed that Peterman Manufacturing Company should cut and remove the merchantable timber on the tract for the Petitioner, for which the Petitioner would pay them the market or ceiling price for the timber removed, less certain stipulated stumpage charges; that the Petermans should commence shipping logs from the tract to Petitioner in October, 1943; be in full production by February 1944, and should cut and remove from the tract from twenty to twenty-five million feet per year.

6 Stip. (R. 28). Findings (R. 17).

(8) The Peterman Manufacturing Company was a co-partnership firm, consisting of T. A. Peterman, Katherine Peterman and Gladys Peterman. T. A. Peterman was the managing partner.

6 Stip. (R. 28). Findings (R. 14).

(9) Petitioner's promissory note given for the balance of the purchase price of said property (Exhibit 2) reads:

> "As provided in an agreement dated August 30, 1943, the undersigned, for value received, promises to pay to the order of the Peterman Manufacturing Company the sum of Four Hundred Thousand Dollars ($400,000.00) in lawful money of the United States of America. Payments on this note plus ac-

crued interest at the rate of 3% per annum on deferred balances shall be made on the 15th day of each month beginning November 14, 1943.

"The basis of such principal payments to be $5.00 per thousand feet commercial log scale for all logs except wood logs cut and removed by purchaser or its agents during the previous calendar month as provided in the agreement between T. A. Peterman and Ida C. Peterman, owners, and Oregon-Washington Plywood Company, purchaser, dated August 30, 1943, covering certain timberlands in Tillamook County, Oregon."

(Signed by Petitioner)

Exhibit 2 (R. 39). Findings (R. 16).

(10) On April 15, 1944, in consideration of certain changes in the logging operations, interest accruing on said note after January 1, 1944, was waived for an indefinite period.

11 Stip. (R. 30). Findings (R. 18).

(1) T. A. Peterman died in November 1944; the representatives of his estate wanted to be relieved of the logging contract (Exhibit 4). On January 4, 1946 it was agreed between Petitioner and the representatives of the T. A. Peterman estate, and the surviving co-partners of Peterman Manufacturing Co., that the Petitioner should pay on said note and purchase contract a minimum of $5000.00 per month, commencing June 1, 1946, and the aforesaid logging contract (Exhibit 4) should be cancelled. Also the interest on said note should be waived. Said agreement recites that there was a balance owing on said note and purchase contract on January 4, 1946, of approximately $241,000.00. Thereafter other arrange-

ments were made for the cutting and removal of the timber from said land.

9 Stip. (R. 29). Findings (R. 18).

(12) At a meeting of Petitioner's Board of Directors, held November 4, 1943, its President reported the purchase of said timberland and submitted a copy of the purchase contract (Exhibit 1) and of the note (Exhibit 2) with the statement that the note and the advanced money payments under the contract (to-wit: $100,000.00) completed the payment for the timber and timberland. The transaction was approved by the unanimous vote of the directors.

(Exhibit 9 (R. 41)).

(13) The note, Exhibit 2, has been paid in full with the exception of the portion of the interest waived, and the timberland purchased (described in Exhibit 1) was conveyed to petitioner by warranty deed dated December 22, 1949 (30 R. Findings R. 19).

Petitioner claims the debt was incurred for a business purpose and is evidenced by a mortgage and note within the meaning of Sec. 719 of the Revenue Code. That the purchase contract (Ex. 1, R. 30-36) is in effect a mortgage under Oregon laws. That both the mortgage and the note evidence an unconditional obligation of the petitioner to pay $400,000.00. That there is no deficiency in Petitioner's excess profits tax for the year 1944.

ERROR OF THE TAX COURT RELIED UPON

I.

The Tax Court misinterpreted the legal effect of the purchase contract (Ex. 1, R. 30) and the note (Ex. 2, R. 39) and the other facts stipulated (R. 25-30) and found and promulgated by the Tax Court (R. 13-19).

II.

The Tax Court erred:

(a) In concluding and adjudging that said contract and note, considered alone or in connection with the other facts found by the Tax Court, did not constitute and evidence an unconditional obligation of the Petitioner to pay Peterman Manufacturing Co. the full sum of $400,000.00, and in concluding and adjudging the said indebtedness was not "borrowed invested capital" of the Petitioner within the meaning of Section 719(a)(1) of the Internal Revenue Code, in effect during calendar year 1944.

(b) In concluding and adjudging that Petitioner in computing its excess profits tax for the calendar year 1944, did not have the legal right to take credit for 50 per cent of the average amount owing on said indebtedness during that year, and its unused credits of 50 per cent of the average amount owing on said indebtedness during the calendar year 1945, as "borrowed invested capital", and by determining and adjudging a deficiency

in Petitioner's excess profits tax for the calendar year 1944, in the amount of $19,925.35, or for any amount.

(c) In not determining and adjuging the aforesaid purchase and sales contract was, under the laws of the State of Oregon, in effect a real estate mortgage to secure the payment of the indebtedness owing thereunder, to-wit: $400,000.00, and in not concluding and adjudging that said contract or mortgage and note, considered alone or in connection with other facts connected with the transaction which the Tax Court found to exist, created and evidenced an unconditional obligation of the Petitioner to pay the full sum of $400,000.00, and by not determining and adjudging that Petitioner was within its legal right in taking credit for 50 per cent of the average amount it owed on said indebtedness during the calendar years 1944 and 1945 in computing its excess profits tax for the calendar year 1944.

(d) By not determining and adjudging that there was no deficiency in Petitioner's excess profits tax for the calendar year 1944, and in not vacating the deficiency determined by the Commissioner of Internal Revenue.

III.

More specifically, the Tax Court erred in concluding that the purchase contract (Exhibit 1, R. 30) was a "conditional" land contract and that the balance of the purchase price ($400,000.00) was to be paid during an "indefinite" period; that the monthly payments were "conditional" and that the obligation of Petitioner to pay the balance of the purchase price was "not uncondi-

tional." And by concluding that the clause in the contract giving the vendors the option, in case the Petitioner did not make the payments required of it or defaulted in the performance of the terms of the contract, of either declaring a forefeiture and recovering possession of the timberland, or declaring the whole amount of the debt owing due and sue to collect, made Petitioner's obligation to pay "conditional" (R. 22).

IV.

By concluding that the note (Exhibit 2, R. 39. Findings, R. 17) was "no unconditional promise to pay a certain sum of money on demand, or at a future determinable time."

STATUTES AND REGULATIONS INVOLVED

Section 719, Internal Revenue Code provides:

> "(a) The borrowed capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following:
>
> "(1) The amount of the outstanding indebtedness (not including interest) of the taxpayer which is evidenced by a bond, note, bill of exchange, debenture, certificate of indebtedness, mortgage, or deed of trust, plus, * * *
>
> "(b) The borrowed invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be an amount equal to 50 per centum of the borrowed capital for such day."

Regulation 112, Sec. 35.719-1 defines borrowed capital substantially as defined in Section 719 R.C., except

it adds the word "promissory" immediately ahead of the word "note".

In the present excess profits tax statute (Sec. 439 Revenue Code, U.S.C.A. Vol. 26, 1952 sup.), Congress included "bank loan agreements" and "conditional sale contracts" as evidence of "borrowed capital."

ARGUMENT

SUMMARY: Congress in enacting 719 R.C., did not attempt to define notes, mortgages or trust deeds, for the obvious reasons (1) it does not have the constitutional power to define such instruments, and (2) the forms differ in many of the states. The true test is:

> Could Exhibit 1 (the purchase contract, R. 30) have been foreclosed under the laws of Oregon, the property therein described sold and the proceds of the sale applied on the debt; or, could judgment have been recovered against Petitioner on the note if it had not been paid within a reasonable time?

The indebtedness for which petitioner took credit in computing its excess profits tax was incurred for a business purpose; was evidenced by both a mortgage and note within the meaning of Section 719, R. C., and petitioner's obligation to pay both was absolute and unconditional.

The property for which the indebtedness was incurred is situated in Oregon. Petitioner is an Oregon corporation. If suit or court action had been necessary to foreclose the mortgage or contract, or to collect on the note, the proceedings would have been in the Oregon

Courts. The instruments should be construed according to Oregon laws.

Under Oregon laws the purchase contract (Ex. 1) is in effect a mortgage. The note (Ex. 2) was an unconditional obligation of petitioner to pay $400,000.00 within a reasonable time.

The note was an independent obligation. The payees could have waived the security and recovered judgment on the note alone.

Petitioner's obligation under both the purchase contract and the note was unilateral.

The optional right of the vendors to declare a forefeiture or sue on the note in the event of petitioner's failure to pay, did not make petitioner's obligation conditional.

EXTENDED: The purpose of Congress in prescribing the character of evidence required to prove an indebtedness for "borrowed invested capital" was to make certain that an unconditional debt exists and that there is legal evidence to prove it or secure payment. The debt is the substance. A note, mortgage and deeds of trusts are three of the muniments which Congress has prescribed as sufficient evidence of borrowed capital. Congress has not the power to prescribe the form of notes, mortgages and trust deeds for use in the various states (*Erie R. Co. v. Tompkins,* 82 L. Ed. at p. 1194, 304 U.S. at p. 78). It evidently intended that any instrument which creates a lien against the property of a taxpayer as security for a debt incurred for borrowed capital, under which the property can be sold and the proceeds

applied on the debt, is a mortgage within the meaning of the statute, and that any form of a promissory note on which judgment may be recovered against the maker under the laws of the State of the maker's domicile is a note, within the meaning of the statute. Congress is not so arbitrary or capricious as to enact that a note or mortgage recognizable as such by the laws of the state of the taxpayer's domicile or where his property is situated, cannot be recognized as such under Section 719 of the Revenue Code because not in the form in use in some of the other states of the union.

When Exhibit 1, the purchase contract, was executed and the petitioner had paid $100,000.00 to apply on the purchase price, and had given its note, Exhibit 2, for the balance, $400,000.00, petitioner became the equitable owner of 3500 acres of timberland with the complete right of possession, and the right to cut and remove the timber therefrom to the same extent as if it had acquired legal title by deed and given a mortgage in common form to secure the balance of the purchase price. This ownership was a valuable property interest. Vendors retained the legal title only as a lien on or claim against petitioner's estate or interest in the property as security for the debt. If the debt had not been paid vendors would have had an unqualified right to foreclose the contract as a common form mortgage and require the property sold and the proceeds of the sale applied on the debt. Had the property sold for more than the debt, the surplus would have been payable to the petitioner. This was not something as good as a mortgage, but a mortgage in reality as recognized by Oregon laws. The fact that vendors might

have had the optional right to a "strict foreclosure" or some other remedy, did not weaken or qualify the right to treat and enforce the instrument as a common form mortgage. The statute (719 R. C.) does not require the mortgage foreclosed or evidence that it will be foreclosed, nor does it require the mortgage to be the only remedy. If the creditor holds an instrument which he can, at his option, foreclose as a mortgage, that is all that is required.

(See authorities, Appendix 1, pages 23-29 this brief).

THE PROMISSORY NOTE

Petitioner does not have to rely upon the issue of whether the purchase contract (Ex. 1, R. 30) is a mortgage. The promissory note (Ex. 2, R. 39) meets all the requirements of Sec. 719(a)(1) of the Revenue Code in effect in 1944 applicable to notes. The note was given and accepted for the balance owing on approximately 3500 acres of timberland having thereon in excess of 100 million feet of merchantable timber. The full agreed price stipulated in the contract was $500,000.00. The contract after mentioning cash payments aggregating $100,000.00 stated the balance owing as $400,000.00 and it should be evidenced by petitioner's note. The note was given and accepted and in the note petitioner unconditionally promised to pay to order of Peterman Manufacturing Company $400,000.00. It is significant that the contract recites the balance owing for the timberland to be $400,000.00 and in the note petitioner unconditionally promised to pay $400,000.00. Neither the contract nor the note stated that petitioner should pay

for timber removed at the rate of $5.00 per thousand feet. Had it been the intention of the parties that the petitioner should only pay for the timber removed, the vendors probably would not have sold the land. Certainly petitioner would not have inconditionally promised to pay the full amount of $400,000.00. Its obligation to pay that amount was not conditional on the quantity of timber removed from the land or on any contingency. The contract expressly provides "that no loss or destruction of * * * or damage to any part or all of the property * * * shall give ground for termination or recission of the contract or relieve purchaser from any of the obligations assumed by it" (R. 33). The note required the accrued interest and something on the principal paid on the 15th of each month. The clause reading.

> "The basis of such principal payments to be $5.00 per thousand feet * * * for logs cut and removed by purchaser or its agents during the previous calendar month"

does not detract from or qualify petitioner's antecedent promise in the body of the note to pay $400,000.00. The term "principal payments," refers to and provides a means of determining the amount of the payments to be made on the principal, monthly. The clause also served to protect the vendors security by requiring payments to be made as timber was removed. There was in excess of 100 million feet of timber on the land, petitioner had the right to cut and remove same; had it not cut and removed enough at $5.00 per thousand feet to pay the note in a reasonable time, the unpaid balance would, by the terms of the note and operation of law, become due and payable. There was an implied promise or obligation

of the petitioner to cut and remove enough timber from the land to pay the note in full within a reasonable time. It was within petitioner's power to do so.

(See authorities cited appendix 2, pp. 30-34 this brief).

The note required interest paid on deferred balances. It is not reasonable that petitioner would undertake to pay interest indefinitely.

The general rule is that where a note is given for a valuable consideration and does not provide the time of payment, it is payable on demand (8 Am. Jur., p. 26, paragraph 278). It logically follows that when all the timber had been removed or destroyed, any balance owing would be payable on demand.

THE NOTE, AN INDEPENDENT OBLIGATION TO PAY $400,000.00.

The payees or holder of the note could have, at their election, waived the security reserved by the purchase contract and recoverd the balance owing on the note by an independent action at law. (Authorities appendix 3, pages 34-35, this brief).

OBLIGATION OF PETITIONER UNILATERAL.

Neither the contract nor the note required anything done by vendors or the payees of the note to make petitioner's obligation to pay all complete and unconditional. The vendors were not required to give deed or furnish abstract or title insurance until after full payment. The logging contract with the Petermans (6 Stip. R 28, Findings R. 17) did not make petitioner's obliga-

tion to pay conditional or the purchase contract bilateral. In this the Petermans were independent contractors. Their obligation to cut and remove from the land from 20 to 25 million feet of logs per year had no relation to the purchase contract or note, any more than if they were strangers. In cutting and removing the timber they were acting for and as representatives of petitioner. Had they defaulted, petitioner could have engaged others to do the logging and would have had an independent right of action against the Petermans for damages (*McCracken v. Bay City Land Co.,* 93 Ore. 461, 183 Pac. 9). The contract did, however, place the Petermans in position to mature as much as $125,000 a year on the note, as they had the right to cut and remove a maximum of 25 million feet a year and were required to cut and remove a minimum of 20 million feet a year. This showed a plan of petitioner to make substantial payments on the note each year.

OPTIONAL RIGHT OF VENDORS TO DECLARE A FOREFEITURE OR COLLECT ON THE NOTE

The Tax Court was clearly wrong in holding that the clause in the contract giving to the vendors the optional right in the event of default in payment, or other default of petitioner, to either declare a forefeiture and retain the payments made, or declare the full balance owing due and sue to collect, made petitioner's obligation to pay the full amount of the note conditional (R. 22). The vendors or the payees of the note were given the unrestricted right to declare the full amount owing due and payable in event of petitioner's default. The fact they could have elected some other remedy did not affect

petitioner's obligation to pay until the election was made. The statute (719 R. C.) does not require the note or mortgage to be the exclusive redemy, nor does it impose on the taxpayer the burden of showing that the creditor would enforce the note or mortgage in the event of default. The right of the payee or mortgagee to enforce the note or mortgage is all that is required. Contracts frequently give the parties the choice of two or more remedies in case of a breach. No one remedy is affected prior to election because the party had the option of using the other. Most every important lease provides that on failure of the lessee to pay rent, or other breach on his part, the lessor may either terminate the lease or collect the rent for the full term. We have never known of a lessee being relieved of his obligation to pay the full agreed rental for the term because the lessor had the optional right, which was not used, to terminate the lease instead of demanding the rent for the full term.

DECISIONS RELIED UPON BY THE TAX COURT.

The facts on which the decisions relied upon by the Tax Court (R. 21-23) were decided are different from the facts in this case. In those cases the obligation of the taxpayer to pay was not definite and unconditional and evidenced by an enforcible note or mortgage.

In condensed form, the issue in this case is, whether the debt—$400,000.00, was an unconditional obligation of the petitioner, and evidenced by either a note or

mortgage, within the meaning of Section 719 Revenue Code.

This note (Ex. 2) should not be confused with those providing for payment "if and when" certain events occur. Here the note was given for value—an existing debt of $400,000.00—petitioner unconditionally promised to pay all. For convenience, payments on the principal were to be made in monthly installments and a practicable means was provided for determining the amounts. It was within the power of petitioner to do what was required to determine the amounts. It had purchased 3500 acres of timberland having thereon more than 100 million feet of merchantable timber and had the right to cut and remove the timber. Prior to the signing of the note had entered into a contract requiring from 20 to 25 million feet per year to be cut and removed from the tract. We think any Court would hold that it was petitioner's unconditional obligation to pay the note in full within a reasonable time—not to exceed six years from its date. That the note or contract alone would be sufficient evidence of the debt and the promise to pay. That when the last of the timber was removed if note had not been paid in full, the balance would be due.

Respondent's contention that the debt was not within the meaning of Section 719 of the Code is not only ultra technical but entirely wrong. The record shows the debt paid in full as planned.

Respectfully submitted,

GEORGE J. PERKINS,
Attorney for petitioner.

APPENDIX 1.

MORTGAGES ON PROPERTY IN OREGON AND PURCHASE CONTRACTS

The statutes of Oregon do not define mortgages, except as shown below:

(a) That mortgages may be foreclosed by suit in equity. (Sec. 9-501 O.C.L.A.)

(b) That a mortgage on real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure according to law. (Sec 8-211 O.C.L.A.)

(c) That a mortgage shall not be construed as implying a covenant to pay a debt intended to be secured thereby unless the instrument contains an express covenant to pay, or there is a bond, note or some other instrument obligating the mortgagor to pay the debt. In the absence of such a covenant, or other instrument obligating the mortgagor to pay the debt, the remedy is limited to the land mortgaged. (Sec. 68-101 O.C.L.A.)

(d) In the foreclosure of a mortgage given to secure the purchase price of real property, the decree shall not entitle the mortgagee to a deficiency judgment. (Sec. 9-505 O.C.L.A.)

COURT DECISIONS

In *Marx v. LaRocque,* 27 Ore., at page 48, 39 Pac. 401, the Court said:

"* * * The Court looks beyond the terms of the instrument to the real transaction, and when that is shown, will give effect to the contract of the parties; and whatever may be the form of the instru-

ment, if it was executed as security for a debt, it will be treated as a mortgage."

In *Dickson v. Back,* 32 Ore., at page 235, 51 Pac. 727, the Court said:

> "A mortgage under our statute is nothing but a lien which is discharged by the payment of the debt secured thereby."

In *Schleef v. Purdy, et al.,* 107 Ore., at page 77, 214 Pac. 137, the Court, referring to a mortgage on real property, said:

> "It merely created a lien or encumbrance against the property as security for the payment of a debt or the fulfillment of an obligation."

In *Brewster Shirt Corporation v. Commissioner,* 159 Fed. 2d, a tax case under section 719(a)(1) of the Revenue Code, the shirt corporation entered into an agreement with Mills Factors Corporation under which it assigned its accounts receivable to the Mills Factors Corporation and the latter agreed to advance 90 per cent of the face value of the accounts. The shirt corporation guaranteed payment of the accounts and agreed to purchase any not paid. No promissory note or formal mortgage was given. The Court, by Circuit Judge August H. Hand, at page 229, said:

> "It is clear that as soon as the accounts were assigned and advances made thereon, the agreement and assignments involved securities transaction which under the law constituted a mortgage. What legally is a mortgage is a matter of substance and not a mere form, quoting authorities."

UNDER PURCHASE CONTRACTS (SOMETIMES CALLED "BOND FOR A DEED") PURCHASER ACQUIRES EQUITABLE OWNERSHIP.

In *Collins v. Creason,* 55 Ore., at page 529, 106 Pac. 445, the Court said:

> "* * * It follows that when a valid contract for the sale of real property and the execution of a deed therefor, has been consumated, an equitable title to the premises becomes vested in the vendee, who thereafter is treated as the owner of the land, while the money which it to be paid as a consideration therefor is regarded as the property of the vendor, so that, upon the death of the purchaser, his heirs succeed in equity to the rights of their ancestor in the real property, and upon the death of the vendor, his personal representatives succeed to his right to the purchase money remaining unpaid."

In *Grider v. Turnbow,* 162 Ore., at page 641, 94 Pac. 2d 285, the Court said:

> "By the contract of sale the vendee is considered the equitable owner of the land the vendor retains a lien thereon for the purchase price."

In *Flannagan v. Great Central Land Co.,* 45 Ore., at page 342, 77 Pac. 485, the Court said:

> "By the contract of scale an equitable conversion takes place, the vendee being deemed the owner of the land in equity, and the vender to have a lien thereon for the purchase money."

There are other Oregon decisions to the same effect. The above are believed sufficient to show the rule.

VENDOR RETAINS A LIEN UPON (SOMETIMES CALLED A RIGHT AGAINST) THE PROPERTY AS SECURITY FOR THE UNPAID PURCHASE

PRICE. THIS LIEN OR RIGHT MAY BE FORECLOSED AS A COMMON FORM MORTGAGE, AND, IN SOME INSTANCES, BY A "STRICT FORECLOSURE."

In *Davis v. Wilson,* 55 Ore., at page 407, 106 Pac. 795, the Court said:

> "Under an executory contract for the sale of real estate the vendor, in the absence of language in the bond or contract indicating some other intent, is the holder of the legal title as security for the deferred payments." Quoting authorities

In an early case, *Burkhart v. Howard,* 14 Ore. 39-46, the vendor executed a sales contract, denominated a bond for a deed to certain real property, and in addition to the contract, took from the purchaser a note for the balance of the purchase price. The vendor assigned the note, but did not expressly assign the sales contract or convey the property. The Administrator of the assignee brought suit to foreclose the purchase contract, claiming it was in effect a mortgage to secure the unpaid purchase price, and the assignment of the note had the effect of carrying with it the purchase contract and the vendor's interest in the property, the same as if the note had been secured by an ordinary mortgage. The Court, at page 44, said:

> "The appellant's counsel contends that the effect of the bond (the sales contract) transferred the title in equity to the lots from the former (the vendor) to the latter (the vendee); that he (the vendor) held the legal title merely as security for the payment of the note; and that when he transferred the note to the appellant it entitled the latter to the benefit of the security; that the transaction between said

Monteith (the vendor) and Estelle M. Howard (the vendee) was, in effect a mortgage in favor of the former upon the premises in question, to secure the purchase money, and that when the note was transferred, it was as effectual to transfer the security as the assignment of a note secured by a mortgage would be to transfer the mortgage. It occurred to me upon the hearing that said counsel's position was entirely correct in principle, and I am still of that opinion."

In *Security Savings Co. v. Mackenzie,* 33 Ore. 209-215, at page 212, 52 Pac. 1046, the Court said:

"Mr. Pomeroy, speaking of the rights and equities of a vendor and vendee under a contract for the sale of land, says that, until the terms of the contract are complied with 'the legal title remains in the vendor as security; or, as it is otherwise expressed, he has a lien upon the vendee's equitable estate as security for the payment of the purchase money according to the terms of the agreement. Practically this lien consists of the vendor's right to enforce payment of the price by a suit in equity against the vendee's equitable estate in the land, instead of by the means of an ordinary action at law to recover the debt. * * *

* * * Under this doctrine, the vendee is regarded as the beneficial owner, and the vendor as holder of the legal title as security for the porformanse of the vendee's obligations; and the so called 'lien' is simply the vendor's right to enforce his claim for the purchase money against or out of the vendee's equitable estate, by means of a suit in equity. * * * In the light of this doctrine, the vendor under such a contract has a right, if he choses, to go into a court of equity upon the default of the vendee, and foreclose the latter's equitable interest in the land: *and in such suit the court may either decree a strict foreclosure or a sale of the land, as the equities of the case may suggest.*" (Emphasis added)

In *Flanagan v. Great Central Land Co.,* 45 Ore. 335-346, supra, the Court discussed the rights of the vendor to a strict foreclosure under certain conditions and said:

> "* * * it does not follow that the Court will always declare a strict foreclosure of the contract. It may also decree a foreclosure by a sale of the land in the ordinary way, although the title has not passed from the vendor, dependent upon the exigencies and equities of the case * * * Mr. Story says: 'the usual course of enforcing a lien in equity, if not discharged, is by sale of the property to which it is attached.' "

After quoting other authorities, the Court continued:

> "Thus we find that strict foreclusure is the exception, not the rule, but if required by the equities of the case, the Courts will not hesitate to enforce it."

The Court also discussed the time which should be allowed the vendee to redeem, or pay the balance owing under the contract and retain the property. That depends upon the amount paid on the purchase price, whether the property has increased in value and other conditions. Entirely within the discretion of the Court. In that case, the Court allowed six months from the time the final decree was entered.

In *Grider v. Turnbow,* 162 Ore., at page 641, 94 Pac. 2d 285, the Court followed the two decisions last quoted from, and said:

> "Equity may either grant strict foreclosure of the contract or it may decree a foreclosure by sale of the land in ordinary way. * * *"

In re Estate of Denning, 112 Ore. 621-631, 229 Pac.

912, an executory contract for the sale of land, was treated as a mortgage and forclosed as such.

COMMENT: In some of the decisions the Court refers to the vendor's interest as a lien upon the property sold to secure the balance of the purchase price, and in some as a right to enforce his claim against the vendee's equitable ownership to secure or obtain the balance owing on the purchase price. In all of the cases the Courts recognize that upon the execution of the sales contract and making the initial payment, the purchaser becomes the equitable owner of the land, and the vendor retains the legal title as a lien, or right, to secure the balance of the purchase price, which may be treated and foreclosed as a common form of mortgage. But, if the vendor requests, and in the opinion of the Court the equities justify, the vendor may have the alternative of a "strict foreclosure". That is, the Court may in its discretion require the vendee within a fixed time to pay the full balance owing on the purchase contract or have his estate in the property terminated. In foreolcsure of the common form mortgages the property is advertised and sold to the highest bidder. The mortgagor has one year from date of confirmation of the sale in which to redeem.

APPENDIX 2.

THE PROMISSORY NOTE IS AN UNCONDITIONAL PROMISE TO PAY $400,000.00.

General authorities:

8 Am. Jur., page 27, par. 281, the text reads:

"* * * If the debt for which the instrument (a promissory note) is given is an absolute liability and is due, however, and the happening of a future event is fixed upon merely as a convenient time of payment and the future event does not happen as contemplated, the instrument becomes due and payable within a reasonable time. If the fulfillment of the condition or the happening of the specified event is wholly or partially within the control of the maker of the instrument and if the insturment, read read in the light of surrounding circumstances, shows that the debt is an absolute one, it is only reasonable to suppose that the parties intended that a proper effect should be made to cause the event to happen within a reasonable time. Accordingly, a note, payable when certain land for the purchase of which the note is given is sold by the purchaser, is payable at the expiration of a reasonable time for effecting the sale. Likewise, a mortgagor who makes a note secured by the mortgage and payable when a sale is made by the maker is bound to sell within a reasonable time; otherwise, the note becomes due at the end of such period."

10 C.J.S., page 740, par. 245, the text reads:

"Where the debt for which commercial paper is given is due and the happening of a future event is fixed on merely as a convenient time for payment and the future event does not or cannot happen as contemplated, the law implies a promise to pay within a reasonable time."

THE NOTE SHOULD BE CONSTRUED IN ACCORDANCE WITH OREGON COURT DECISIONS.

In *Nolan v. Bull,* 24 Ore. 479-485, 33 Pac. 983, the instrument read:

> "This is to certify that I, the undersigned, do agree to pay the sum of five hundred dollars unto Delia Nolan when the sale of the property known as the Stephens Ranch shall be accomplished; the said place to be sold for not less than two thousand five hundred dollars."
>
> (Signed) Benjamin Bull

The above debt of $500.00 was for the balance owing for the Stephens Ranch purchased by Benjamin Bull at the agreed price of $2,000.00 (24 Ore., page 480). Decision in 1893. The Court after analyzing decisions of the Supreme Courts of California, Maine, Missouri and Mississippi, and *Nunez v. Dautel,* 19 Wall. 562, sustained the judgment for the debt, and said:

> "Where there is a present debt then due, constituting the basis of an agreement which merely postpones the time of its payment to an uncertain future date, when a certain specified transaction shall be accomplished, *the agreement is to pay within a reasonable time whether such trancastion is accomplished or not."* (Emphasis added)

In *Branch v. Lambert,* 103 Ore. at 437, 205 Pac. 995, the Court said:

> "An obligation which is payable when certain land is sold is payable at the expiration of a reasonable time for effecting the sale: Noland v. Bull, 24 Ore. 479; Hood v. Hamilton Plains Exploration Co., 106 Fed. 408; Crooker v. Holmes, 65 Me. 195 (20 Am. Rep. 687); Hughes v. McEwen, 112 Miss. 35

(72 South. 848, L.R.A. 1917B, 1048, and case note p. 1050).

"What is a reasonable time for effecting the sale depends upon the circumstances of the particular case: Hood v. Hamilton Plains Exp. Co., 106 Fed. 408, 411."

In *Harrison v. Beal,* 111 Ore. at page 570, 222 Pac. 728, the Court said:

"At the outset we remember that a promissory note is an agreement in writing by which the maker promises to pay a certain sum of money absolutely and in all events * * * Unless otherwise provided in the instrument as between himself and the payee of the note, the maker assumes to perform all the affirmative acts required for the fulfillment of the contract." (Quoting authorities)

In *Naftzer v. Buser, et al.,* 106 Kan. 115, 186 Pac. 997, decided 1920, the note read:

"Wichita, Kan., October 25, 1917.

"The following note is given to cover balance of payment of 112,000 shares of stock in Wichita Independent Consolidated Companies at fifteen cents per share, and is to be paid as the stock is sold by Buser & Carney.

"On demand we promise to pay L. S. Naftzer, his heirs or assigns, fifteen thousand eight hundred dollars ($15,800.00), without interest, payments to be made from time to time as the stock is sold, the stock being held in escrow in our office pending sale by us. (Signed) Buser & Carney

H. J. Buser"

The Court said:

"The instrument expresses an obligation to pay which is not itself conditional or contingent. The time of payment alone is uncertain, and the law in

such cases supports instead of defeats the obligation, by *implying a reasonable time.* (Emphasis added). With the time of payment thus fixed the instrument is definite and complete, and discloses an absolute liability which could not be defeated by parol evidence of conditional liability. The cases in which written obligations were not permitted whittled down, or overthrown, or converted into something else, by parol evidence of contradictory agreements between the parties, are so numerous that citation in unnecessary."

In *Crooker v. Holmes,* 65 Me. 195, (20 Am. Rep. 687), the promissory note was made payable "when I sell my place where I now live." Held the maker bound to sell within a reasonable time, and failing in that, the note was due.

The following decisions sustain the rule that where one gives a note for an existing debt, or for any valuable consideration, promising unconditionally to pay, and time of payment to be determined by the occurrence of some specified event, the note is payable within a reasonable time if the event does not or cannot occur. Especially where it is within the power of the maker to cause the event to occur:

California,	Willinston v. Perkins, 51 Cal. 554.
Georgia,	Wilcox v. Turner, 51 Ga. App, 523, 181 S.E. 95.
Illinois,	Emma Allen v. Est. Henry P. Allen, 217 Ill. App. 260.
Iowa,	Works v. Hershy, 35 Ia. 341.
Kansas,	Jones v. Eisler, 3 Kan. 128. Benton v. Benton, 78 Kan. 366, 97 Pac. 378.

Kentucky,	Hicks v. Shouse, 17 B. Monroe, 483.
Massachusetts,	Page v. Cook, 164 Mass. 116, 41 N.E. 115.
Maine,	De Wolfe v. French, 51 Me. 420. Crooker v. Holmes, 65 Me. 195, 20 Am. R. 687. Sears v. Wright, 24 Me. 278.
Missouri,	Ubsdell v. Cunningham, 22 Mo. 124.
Mississippi,	Randall v. Johnson, 59 Miss. 317. Hughes v. McEwen, 112 Miss. 351, 73 South. 59.
Nebraska,	Estate John Backas, 122 Neb. 531 (1932), 240 N.W. 596.
U. S.	Nunez v. Dautel, 19 Wal. 560. Smithers v. Junker, 7 L.R.A. 264, 41 Fed. 101.

APPENDIX 3.

THE NOTE AN INDEPENDENT COVENANT TO PAY.

By the terms of the purchase contract petitioner agreed to pay $500,000.00 for the timberland. The sixth clause of the contract provides that when the purchaser (the petitioner) shall have completed performance of the obligations assumed by it and request a deed the owners (the vendors) shall promptly execute and deliver a deed to purchaser conveying to it said lands. The contract further provides that when the land has been paid for the vendors will furnish abstract or title insurance (Ex. 1, R. 30-36). Nothing is required done by the vendors until petitioner performs all of its obligations, which includes full payment of the agreed price.

In the case of *Walker v. Hewett,* 109 Ore. 366-381 (1923), 220 Pac. 147. The contract reads that if the vendee first made the payments and performed the covenants on his part to be performed under the contract, the vendors would convey to the vendee the property in the contract described. A note was given for the balance of the purchase price. Court action was filed to collect the note indedenpent of the contract and without tender of deed. The right to maintain the action was sustained. The Court quoted *Loud v. Pomona Land & Water Co.,* 153 U.S. 564, 38 L. Ed. 822 and many other decisions as sustaining the right.

In *Oregon and Western Colonization Co. v. Strange,* 123 Ore. 377-383 (1927), 260 Pac. 1002. At page 382 (Oregon report) the Court said:

> "The notes given by the defendants constitute independent contracts and plaintiff could sue on one or all of them without tendering a deed: Hawley v. Bingham, 6 Ore. 76. By the terms of the contract the notes must be paid and other covenants in the contract performed by defendants before they or either of them entitled to a deed. Plaintiff had the option of suing on the notes as they came due and were not paid according to the terms of the contract. Defendants have no right to select for the plaintiff the remedy or course of procedure where it has more than one open to it under the law." (Quoting Walker v. Hewett, supra)

Thorp v. Rutherford, 150 Ore. 163 (1935), 43 Pac. 2d 907.

Bank of California v. Bishop, 137 Ore. 34 (1931), 300 Pac. 1023.

Loud v. Pomona Land & Water Co., 153 U.S. 564; 38 L. Ed. 822.

are to the same effect.

No. 14084

In the United States Court of Appeals for the Ninth Circuit

OREGON-WASHINGTON PLYWOOD COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 12-24) are reported at 21 T.C. No. 115.

JURISDICTION

This petition for review (R. 42-46) involves excess profits taxes for the calendar year 1944. The notice of deficiency was mailed to the taxpayer on December 27, 1951. (R. 4.) Within the prescribed ninety-day period, on March 19, 1952, the taxpayer filed a petition for redetermination with the Tax Court under the provisions of Section 272 of the Internal Revenue Code. (R. 8.) The decision of the Tax Court sustaining the

Commissioner's deficiency determination was entered on July 21, 1953. (R. 24-25.) The case is brought to this Court by a petition for review filed by the taxpayer on September 18, 1953 (R. 42-46). Jurisdiction is conferred on this Court by Section 1141(a) of the Internal Revenue Code as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the Tax Court erred in holding under the facts that the taxpayer did not have during the years 1944 and 1945 an "outstanding indebtedness" which was "evidenced by" a "note" or "mortgage" within the meaning of Section 719(a)(1) of the Internal Revenue Code?

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 719 [as added by Sec. 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974]. BORROWED INVESTED CAPITAL.
>
> (a) *Borrowed Capital.*—The borrowed capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following:
>
> (1) [as amended by Sec. 230(b)(2) of the Revenue Act of 1942, c. 619, 56 Stat. 798] The amount of the outstanding indebtedness (not including interest) of the taxpayer which is evidenced by a bond, note, bill of exchange, debenture, certificate of indebtedness, mortgage, or deed of trust, plus,
>
> * * * * *
>
> (b) *Borrowed Invested Capital.*—The borrowed invested capital for any day of any taxable year

shall be determined as of the beginning of such day and shall be an amount equal to 50 per centum of the borrowed capital for such day.

(26 U.S.C. 1946 ed., Sec. 719.)

Treasury Regulations 112 promulgated under the Internal Revenue Code:

SEC. 35.719-1 *Borrowed Invested Capital.*—The borrowed invested capital for any day of the taxable year is 50 per cent of the borrowed capital for such day determined as of the beginning of such day. Borrowed capital is defined to mean:

(a) Outstanding indebtedness (other than interest, but including indebtedness assumed or to which the taxpayer's property is subject) of the taxpayer which is evidenced by a bond, a promissory note, bill of exchange, debenture, certificate of indebtedness, mortgage, or deed of trust, plus

* * * * *

STATEMENT

The facts as found by the Tax Court are as follows:

The taxpayer is an Oregon corporation which, during the years material herein, was qualified to transact business in the State of Washington, as a foreign corporation. The taxpayer's income and excess profits tax returns for the taxable years 1944 and 1945 were filed with the Collector of Internal Revenue for the District of Washington. (R. 13.)

At all times material to this proceeding the taxpayer owned and operated a plywood manufacturing plant at Tacoma, Washington, and in that vicinity there was a scarcity of raw material, namely, peeler logs. (R. 14.)

On July 30, 1941, T. A. Peterman acquired title by

deed to approximately 3,500 acres of timberland in Tillamook County, Oregon, which he had not conveyed or encumbered prior to the execution of a contract of purchase and sale dated August 30, 1943, hereinafter mentioned. That tract of timberland was cruised in December, 1940, and January, 1941, and the timber cruiser's report showed an estimated total of 109,528,000 feet of merchantable timber. The tract contained a large amount of dead timber which had been killed by a forest fire and the time for using the dead timber as peeler logs was limited. During 1943 and until November 16, 1944, T. A. Peterman, Katherine Peterman and Gladys Peterman were partners doing business under the firm name of Peterman Manufacturing Company which owned a large amount of logging equipment and maintained a logging organization in the area of the above-mentioned tract of timberland. The taxpayer had no logging equipment or facilities for logging timber. (R. 14.)

On August 30, 1943, T. A. Peterman and his wife as owners and the taxpayer as purchaser executed a contract of purchase and sale of the above-mentioned 3,500-acre tract of timberland in Tillamook County, Oregon. The agreed purchase price was $500,000 payable $25,000 on date of the contract, $75,000 on or before September 30, 1943, and the balance of $400,000 "evidenced by a note made payable" to Peterman Manufacturing Company and delivered thereto on or before September 30, 1943. (R. 14-15.) Payments on the note, plus accrued interest at the rate of three per cent per annum on deferred balances, were due on the 15th day of each month beginning November 15, 1943, on the basis of $5 per thousand feet, commercial log scale, cut and removed by the purchaser during the previous

month. If the purchaser defaulted in the monthly payments logging operations were to cease until the default was made good. The purchaser agreed, *inter alia,* that it would conduct its operations on the lands in a good and workmanlike manner in accordance with the best methods and usages practiced in the Douglas Fir area and the Oregon laws and regulations; that it would pay all taxes and assessments levied upon the lands; that it would scale the logs cut and removed and keep accurate records; and that no loss or destruction of, nor injury or damage to any part or all of the property from fire, wind, or other element or casualty whatsoever would give ground for the termination or rescission of the contract or relieve the purchaser of its obligations thereunder. The contract further provided that "time is of the essence of this contract and each and every portion thereof" and that in the case of purchaser's default in payments or performance of other terms of the contract and after certain notice, the owners may elect to declare the contract at an end with all payments and improvements on the property forfeited as liquidated damages, or the owners may elect to declare all unpaid sums plus accrued interest immediately due and payable and bring suit therefor. (R. 15-16.) Further, the owners reserved title to the lands and timber thereon until complete performance of the contract by the purchaser but title to the logs passed to the purchaser as they were cut and removed from the land. Upon completion of the purchaser's obligations under the contract the owners agreed to execute and deliver a deed to the timberlands in fee simple with covenants of warranty and good commercial abstract or title insurance in a sum equal to the price paid for the land subject to

certain existing record reservations and easements. (R. 16.)

The taxpayer made the cash payments totaling $100,000 required by the contract of August 30, 1943, and on September 30, 1943, delivered the following note as provided in that contract (R. 16-17):

Tacoma, Washington, September 30, 1943.

$400,000.00

As provided in an agreement dated August 30, 1943, the undersigned for value received promises to pay to the order of the Peterman Manufacturing Company the sum of Four Hundred Thousand Dollars ($400,000.00) in lawful money of the United States of America. Payments on this note plus accrued interest at the rate of 3% per annum on deferred balances shall be made on the 15th day of each month beginning November 15, 1943.

The basis of such principal payments to be $5.00 per thousand feet commercial log scale for all logs except wood logs cut and removed by purchaser or its agents during the previous calendar month as provided in the agreement between T. A. Peterman and Ida C. Peterman, owners, and Oregon-Washington Plywood Company, purchaser, dated August 30, 1943, covering certain timberlands in Tillamook County, Oregon.

OREGON-WASHINGTON PLYWOOD COMPANY,
By (S.) PHILIP GARLAND,
Vice President.

Attest:
(S.) MATHILDA M. BARRETT,
Secretary.

On September 18, 1943, the Peterman Manufacturing Company executed a written agreement with the taxpayer whereby for certain agreed prices to be paid by the taxpayer, the former agreed, *inter alia,* to furnish all equipment and labor and pay all costs for logging all merchantable timber on the above-mentioned 3,500-acre tract for the taxpayer. The Peterman Manufacturing Company further agreed to log an annual average of from twenty to twenty-five million feet a year until all of the timber be logged from the tract, to commence shipping logs in October and to be in full production by February, 1944. (R. 17.)

On September 30, 1943, the Peterman Manufacturing Company executed an additional agreement with the taxpayer to purchase at certain prices all logs cut other than the fir peeler logs and certain fir sawmill logs needed by the taxpayer. (R. 17-18.)

T. A. Peterman died on November 16, 1944. Thereafter the surviving partners, the decedent's wife and executors of the decedent's estate, desired to be relieved of the agreements mentioned in the next two preceding paragraphs as to logging operations and the purchase of logs, and they were terminated by a cancellation agreement dated January 4, 1946, between the interested parties and the taxpayer. Also on January 4, 1946, the same interested parties and the taxpayer executed an amendment to the above-mentioned contract dated August 30, 1943, whereby, *inter alia,* the balance of the purchase price of the timberland of approximately $241,000 owing by the taxpayer under the August 30, 1943, contract and September 30, 1943, note, would be paid as follows: a minimum payment of $5,000 on June 1, 1946, and the first of every succeeding

month thereafter until the principal of the note was paid in full, plus additional payments "to be credited on the aforesaid note and contract" at the rate of $5 per thousand feet cut in excess of seven million feet during 1946 and twelve million feet during any subsequent calendar year. Furthermore, the interest provided for in the August 30, 1943, contract and note thereunder was expressly waived and it was agreed that no interest would be charged or collected "on the balance owing on the aforesaid indebtedness or on said note." (R. 18-19.) Except as so amended the August 30, 1943, contract remained in full force and effect. (R. 19.)

On January 4, 1946, the taxpayer entered into a contract with the firm of Yunker and Wiecks for the cutting of timber on the abovementioned 3,500-acre tract. (R. 19.)

The taxpayer's records show that 90,933,000 feet of timber were logged from the land between August 30, 1943, and August 31, 1952. The taxpayer's above-mentioned note for $400,000 dated September 30, 1943, was paid in full sometime prior to December 22, 1949, on which date the taxpayer acquired legal title to the 3,500-acre tract of timberland by warranty deed from the heirs of T. A. Peterman. (R. 19.)

The Commissioner determined an excess profits tax deficiency of $19,925.35 against the taxpayer for the calendar year 1944 and was sustained by the Tax Court in its decision that, in determining the excess profits credit based upon the invested capital method the taxpayer's obligation for the balance due under a contract for purchase and sale of timberlands and an alleged promissory note pursuant to that contract, did not constitute an outstanding indebtedness evidenced by a note

or mortgage which may be included in borrowed capital for the years 1944 and 1945; within the meaning of Section 719(a)(1) of the Internal Revenue Code. (R. 12-13, 24-25.) Accordingly this appeal resulted.

SUMMARY OF ARGUMENT

This appeal presents the single question whether a land contract of conditional sale and a so-called note executed by taxpayer created an indebtedness evidenced by a note or mortgage resulting in borrowed invested capital within the meaning of Section 719(a)(1) of the Internal Revenue Code. The statute requires both that there be an indebtedness and that it be evidenced by one of the kinds of indebtedness enumerated in the statute. Here there was neither.

There was no indebtedness because the taxpayer's obligation to pay the alleged amount of the contract price was conditioned on the cutting of enough plywood logs to pay the price at the rate of $5 per thousand feet of timber cut and removed by the taxpayer or its agents. Both the conditional land contract and the alleged note contain the same language regarding the rate of payment and the latter instrument even makes specific reference to the contract. If the words of the statute are interpreted in their *ordinary everyday sense,* it is clear that there was neither a mortgage, nor a note involved herein. The contract was not a mortgage since the vendor retained title—thus making the contract a conditional sales agreement, an instrument not included within Section 719(a)(1). The so-called note does not satisfy the statute and Regulations since it is not negotiable and the promise to pay is not unconditional.

Even assuming *arguendo* that the requirements of

Section 719(a)(1) have been satisfied, it is still impossible to compute the borrowed invested capital within the meaning of Section 719(b) since there is no evidence as to the quantity of timber actually cut at any time during the taxable years.

ARGUMENT

The Two Instruments Herein Involved Did Not Create an Indebtedness Includible in Taxpayer's Borrowed Capital Under Code Section 719

The issue in this case is simply whether the taxpayer had, during the years 1944 and 1945, an "outstanding indebtedness" which was evidenced by a note or mortgage within the meaning of Section 719(a)(1) of the Internal Revenue Code, *supra*. It is our position that the Tax Court correctly held that the taxpayer's obligation during the years 1944 and 1945 under the two instruments involved herein was not an outstanding indebtedness evidenced by a note or mortgage within the meaning of Section 719 of the Code.

In computing excess profits tax liability imposed by the Internal Revenue Code (Section 711) [1] a corporation is allowed an "excess profits credit" which may be determined in either of two ways: (1) under the "income" method (Code Section 713), or (2) the "invested capital" method (Section 714). The credit allowed under the latter method is based on the "average invested capital" for the taxable year (Section 715),

---

[1] Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, added to the Internal Revenue Code subchapter E of Chapter 2 (Sec. 710 *et seq.*), known as the Excess Profits Tax Act of 1940. The tax was repealed by Section 122(a) of the Revenue Act of 1945, c. 453, 59 Stat. 556, effective for taxable years beginning after December 31, 1945.

including "borrowed invested capital" as defined in Section 719, *supra.*[2]

Taxpayer used the invested capital method in computing its excess profits tax credit, and in its excess profits tax returns for 1944 and 1945,[3] it included in "borrowed capital" unpaid balances in the amounts of $171,974.05 for 1944 and $130,746.55 for 1945—that is, fifty per cent of its average daily balance under its contract for purchase and sale of timberlands. (R. 26.) The Commissioner disallowed the inclusion of these amounts and was sustained by the Tax Court.

Section 719(a)(1) defines "borrowed capital" as the "amount of the outstanding indebtedness * * * which is evidenced by a bond, note, bill of exchange, debenture, certificate of indebtedness, mortgage or deed of trust." The statute thus imposes two separate requirements: (1) that there be an outstanding indebtedness, (2) that the indebtedness be evidenced by one of the specified types of instruments. *Canister Co.* v. *Commissioner,* 164 F. 2d 579 (C.A. 3d), certiorari denied, 333 U.S. 874. The taxpayer cannot demonstrate borrowed capital because it was not indebted, but if it were indebted the conditional sales contract which evidenced the indebtedness is not one of the types of indebtedness described in the statute nor does the alleged

---

[2] The invested capital credit is determined under Section 714 by applying certain rates to the amount of the "average invested capital" for the taxable year, the statutory invested capital being, in effect, the total of the paid in capital of the corporation and retained earnings, plus an amount equal to fifty per cent of the "borrowed capital" for the taxable year. Secs. 715-720 of the Code.

[3] Since the excess profits tax credit for 1945 exceeded excess profits tax net income for that same year, there was no deficiency for 1945.

note qualify as a true promissory note as required by the statute and Regulations. For these reasons the decision below is correct.

A. *The conditional sales contract and the alleged note did not create an indebtedness within the meaning of Section 719(a)(1)*

To constitute "outstanding indebtedness" as that term is used in Section 719(a)(1) the taxpayer's liability to pay must be unconditional. *Bernard Realty Co.* v. *United States,* 188 F. 2d 861, 863 (C.A. 7th); *Downey Co.* v. *Commissioner,* 172 F. 2d 810 (C.A. 8th); *Consolidated Goldacres Co.* v. *Commissioner,* 165 F. 2d 542 (C.A. 10th), certiorari denied, 334 U.S. 820; *Frankel & Smith Beauty Dept.* v. *Commissioner,* 167 F. 2d 94 (C.A. 2d); *Canister Co.* v. *Commissioner, supra; Gilman* v. *Commissioner,* 53 F. 2d 47 (C.A. 8th).

We think it is not open to question that the promise to pay contained both in the conditional sales contract and the alleged note was itself conditional. Both provide that the $400,000 balance was to be paid at the rate of $5 per thousand feet commercial log scale, for all logs except wood logs cut and removed by the taxpayer or its agents during the previous calendar month. (R. 15, 17, 31 and 39.) In the event of default, the seller was given the option of declaring the contract at an end and taking as forfeit all payments heretofore received, considering them liquidated damages, or of declaring all unpaid sums plus interest immediately due and payable. It is apparent from these provisions that the taxpayer did not unconditionally obligate itself to pay $400,000. It is true that, if it had defaulted and the seller had elected the second option, the $400,000 would

have become an indebtedness, but default and the proper subsequent election were contingencies which did not occur by the end of the years here involved and accordingly no indebtedness arose.

In *Frankel & Smith Beauty Dept.* v. *Commissioner, supra,* the taxpayer agreed to pay for certain equipment installed in its store by its landlord, the payments to be made over a period of years, at the expiration of which time it was to become the owner of the property. The agreement contained a provision giving the landlord-vendor the right to terminate the contract, in which event the taxpayer was not required to make further payments. In holding that the amounts payable under the contract were not includible in taxpayer's borrowed capital, the court stated (p. 96):

> In the second place, the obligation, in several respects, was not unconditional. We need point to but one condition: Jordan Marsh had the right to terminate the agreement at will, on sixty days' notice at any one of divers dates during the ten-year period of the lease; if it so acted, then, by the provisions of the contract, taxpayer was not required to make any further payments * * *.

Whether taxpayer would default any of its obligations under the contract and, if so, whether the vendor would exercise its option to terminate the contract and relieve taxpayer of the obligation to make further payments, is beside the issue. The important consideration is that the parties saw fit to make such provision in their agreement, and that during the taxable years such contingency existed.

That "an obligation is not necessarily an 'indebtedness' " is clear. *Deputy* v. *du Pont,* 308 U.S. 488, 497.

Here the taxpayer undertook many obligations, such as the conducting of its operations in a good and workmanlike manner; complying with all laws and regulations relating to safety appliances and equipment, fire supervision, patrol and equipment, and slash disposal; paying taxes and assessments; maintaining accurate records; and saving harmless the sellers from any claims arising out of taxpayer's operations. (R. 32-33.) But the obligation of the taxpayer did not ripen into an indebtedness until each log was cut. *Consolidated Goldacres Co.* v. *Commissioner, supra; Downey Co.* v. *Commissioner, supra; Wm. A. Higgins & Co.* v. *Commissioner,* 4 T. C. 1033, 1043. The indebtedness so created was not required to be paid until the 15th of the month next succeeding. (R. 31.) It is therefore clear that no debtor-creditor relationship existed for the contract price and no indebtedness resulted prior to the beginning of logging operations. Accordingly, taxpayer is not entitled merely on account of either of the two instruments to include any amount as borrowed invested capital in computing its excess profits taxes for the years 1944 and 1945.

B. *The contract was not a "mortgage" within the meaning of Section 719(a)(1)*

Even granting *arguendo* that the contract was an unconditional indebtedness, taxpayer still cannot prevail because it has failed to meet the additional statutory requirement that the indebtedness be "evidenced by a bond, note, bill of exchange, debenture, certificate of indebtedness, mortgage, or deed of trust." The Tax Court held that this requirement was not satisfied, holding that the contract herein involved was a conditional land contract. (R. 22.)

In defining borrowed capital for federal tax purposes as "indebtedness * * * evidenced by a * * * note * * * mortgage," Congress used the terms "mortgage" and "note" according to their ordinary legal meanings, and not according to any particular state law interpretation, as taxpayer erroneously contends.[4] (Br. 15-17.) *Bernard Realty Co. v. United States, supra,* p. 864; *Consolidated Goldacres Co.* v. *Commissioner, supra,* pp. 545-546. See also *Crane* v. *Commissioner,* 331 U.S. 1; *Estate of Putnam* v. *Commissioner,* 324 U.S. 393; *United States* v. *Pelzer,* 312 U.S. 399; *Lyeth* v. *Hoey,* 305 U.S. 188. Had Congress intended to include in the definition any indebtedness evidenced by an instrument which is equivalent to a mortgage or note it could readily and simply have said so. Instead, it narrowly defined the type of indebtedness includible in borrowed capital by specifying that it must be evidenced by a "bond," "note," "mortgage," etc. By specifically enumerating the kinds of instruments which qualify as evidences of indebtedness it excluded all other forms of indebtedness. To hold otherwise would render superfluous the clause "evidenced by a bond, * * *."

This is made abundantly clear by Section 719(a)(1). The report of the Subcommittee of the Committee on Ways and Means on Proposed Excess-Profits Taxation and Special Amortization, 76th Cong., 3d Sess., originally recommended that (p. 5):

> to the equity invested capital so arrived at there be added, under a graduated limitation at varying percentages (100, 66⅔, 33⅓), the borrowed capital

[4] As the Tax Court observed (R. 22-23), even though the land contract may be the equivalent of a mortgage for certain remedial purposes under the laws of Oregon, that fact is not controlling here.

of the taxpayer *which is evidenced by a written promise to pay.* (Italics ours.)

And H. Rep. No. 2894, 76th Cong., 3d Sess. (1940-2 Cum. Bull. 496, 514), which accompanied H. R. 10413, the Second Revenue Bill of 1940, shows (p. 26) that borrowed invested capital was defined as the outstanding indebtedness evidenced by the various instruments mentioned in the Code as it now is, plus the phrase "or any other written evidence of indebtedness." Significantly, neither the Committee on Finance of the Senate in its report (S. Rep. No. 2114, 76th Cong., 3d Sess., p. 14 (1940-2 Cum. Bull. 528, 539)), nor the Committee of Conference in its report (H. Conference Rep. No. 3002, 76th Cong., 3d Sess., p. 12 (1940-2 Cum. Bull. 548, 555)), included the phrase "or any other written evidence of indebtedness" in its definition of borrowed capital. And Section 719(a)(1) of the Code, as added by the Second Revenue Act of 1940 finally enacted, also omits the additional phrase. This history of a legislative narrowing of the scope of indebtedness confirms the conclusion necessitated by the statutory language itself, namely, that Congress intended to confine the definition of borrowed capital to the specific types of instruments enumerated. The Tax Court has consistently so held. *Journal Publishing Co.* v. *Commissioner,* 3 T.C. 518; *Wm. A. Higgins & Co.* v. *Commissioner, supra,* p. 1043; *Flint Nortown Theatre Co.* v. *Commissioner* 4 T.C. 536; see also *Economy Savings & Loan Co.* v. *Commissioner,* 5 T.C. 543, affirmed in part and reversed in part on other grounds, 158 F. 2d 472 (C.A. 6th).

This conclusion is further reinforced by the well-established proposition that a claimed credit, privilege,

or exemption from tax cannot be granted unless specifically authorized by Congress and the claimant must bring himself squarely within the terms of the authorizing statute. *Helvering* v. *Northwest Steel Mills,* 311 U.S. 46, 49; *Deputy* v. *duPont, supra,* p. 493; *New Colonial Co.* v. *Helvering,* 292 U.S. 435, 440.

The interpretation of the statute sought by the taxpayer was flatly repudiated in both *Bernard Realty, supra,* and *Consolidated Goldacres, supra.* There, as here, the taxpayer contended that a contract to purchase property, title to be held by the vendor until the last installment of the purchase price was paid, created an indebtedness which was in substance a "mortgage" within the meaning of Section 719(a)(1). The court in *Consolidated Goldacres* stated (pp. 545-546):

> Words used in a federal taxing statute must of course have a uniform meaning, and are therefore not to be construed according to state law unless the Congress has shown an intention to do so. * * *
>
> As we have seen, the Congress has deliberately chosen words to define the type of "outstanding indebtedness" which will be included in the excess profits credit, and those words should be given their ordinary meaning in common usage. It is true, as pointed out by Consolidated, that in terms of liability imposed, there may be little, if any, distinction or difference between the legal relationship created by a mortgage and a conditional sales contract. Both instruments are intended to provide a measure of security for the performance of an incurred obligation, but they are not used synonymously or interchangeably to describe or define the legal relationship created thereby. Courts have generally recognized the legal differ-

> ence between the two. * * * Especially where, as here, it becomes necessary to discern the legislative intention.

Any reliance by taxpayer on *Brewster Shirt Corp.* v. *Commissioner,* 159 F. 2d 227 (C.A. 2d) is plainly misplaced. In the *Brewster* case the taxpayer assigned accounts receivable to a factor as security for a loan, and under the factoring agreement the taxpayer became unconditionally indebted to the lender. Moreover, the factoring agreement constituted a "mortgage," which fell squarely within the embrace of the statute. The *Brewster* case was distinguished in the *Consolidated Goldacres* case (p. 546) on these grounds, which also serve to distinguish it from this case. That the Second Circuit Court of Appeals in the *Brewster* case was following the same principles as were applied in the *Consolidated Goldacres* and *Canister* cases is apparent from the same court's decisions in *Frankel & Smith Beauty Dept.* v. *Commissioner, supra,* and *In re Lake's Laundry,* 79 F. 2d 326, certiorari denied, 296 U.S. 622. Moreover, the court in the *Brewster* case carefully distinguished the situation there from those in *Journal Publishing Co.* v. *Commissioner, supra; Wm. A. Higgins & Co.* v. *Commissioner, supra;* and *Flint Nortown Theatre Co.* v. *Commissioner, supra,* in all of which the Tax Court held that borrowed capital in the Section 719 sense had not been demonstrated.

In any event, even if (contrary to the decisions) the term "mortgage" as used in Section 719 could properly be construed as embracing an instrument which is "equivalent" to a mortgage, there is no basis for the taxpayer's contention that the instant contract was in

substance a mortgage. It was a conditional land contract, both in substance and in form.

As was fully pointed out in *Bernard* and *Consolidated Goldacres,* Congress used the term "mortgage" in Section 719 in its ordinary sense, and intended it to apply uniformly to all taxpayers subject to the federal excess profits tax. And it is abundantly clear that the term "mortgage" in its common everyday sense has a well accepted meaning throughout the nation which is to be sharply distinguished from the term "conditional sale." 3 Jones, Chattel Mortgages and Conditional Sales 38-39; 2A Uniform Laws Annotated, Bogert's Commentaries on Conditional Sales, P. 11; *In re Halferty,* 136 F. 2d 640 (C.A. 7th); *In re Burgemeister Brewing Co.,* 84 F. 2d 388 (C.A. 7th); *In re Lake's Laundry, supra; Bailey* v. *Baker Ice Machine Co.,* 239 U.S. 268, 271; *Harkness* v. *Russell,* 118 U.S. 663; *Wm. W. Bierce, L'd* v. *Hutchins,* 205 U.S. 340, 348.

The distinction between the two devices is that a mortgage imposes a lien upon property to which the mortgagor has legal title whereas the contract of conditional sale denotes only a change of possession from seller to buyer. 3 Jones, Chattel Mortgages and Conditional Sales 38. That a contract of conditional sale is also used as a security device and that in some few jurisdictions no distinction between a mortgage and contract of conditional sale is made is irrelevant here, since the standard provided by Congress is the term "mortgage" and not all instruments having security elements. The two terms describe distinct devices and, notwithstanding their similarities or dissimilarities, when one is described by name, the other could not have been included in view of the well-established distinction between them. *Consolidated Goldacres Co.* v. *Commis-*

sioner, supra. In *In re Lake's Laundry, supra,* the question was whether property sold under a contract of conditional sale was included in the term "mortgaged property" under subsection (C)(10) of Section 77B of the Bankruptcy Act. The court held that it was not. It stated (p. 328):

> But even though section 77B is a remedial statute to be construed liberally, we think Congress did not intend to ignore the distinction between property mortgaged by a debtor and property held by a debtor as conditional vendee. The distinction has been recognized in legislation from early times, and was a part of the common law. * * * That property held by a conditional vendee is the property of the conditional vendor until the contract price is paid is a principle firmly rooted in the law. *Bailey* v. *Baker Ice Machine Co.,* 239 U.S. 268, * * *.

The above decision was followed by the Seventh Circuit in *In re Burgemeister Brewing Co., supra.* The only difference is that here we have a provision of the Internal Revenue Code that is to be strictly construed, so that *a fortiori* the term "mortgage" cannot be said to encompass a contract of conditional sale.

The agreement here under scrutiny unquestionably constituted a conditional sale, not a mortgage. It expressly provided (R. 35) that title was to be retained by the vendor until full performance by the purchaser. This is "distinctively a feature of a conditional sale." 3 Jones, Chattel Mortgages and Conditional Sales 38-39. The Supreme Court has consistently held that retention of title by a vendor under a contract of sale stamps the arrangement as a conditional sale. *Harkness* v. *Russell, supra; Wm. W. Bierce, L'd* v. *Hutchins,*

supra; Bryant v. *Swofford,* 214 U.S. 279. Section 719 (a) (1) does not provide for the inclusion of conditional sales contracts within borrowed capital as defined by the Code for excess profits tax purposes.

C. *The second instrument does not qualify as a "note" within the meaning of Section 719(a)(1)*

We believe that the two instruments created no indebtedness, but if they did, the indebtedness was nevertheless not borrowed capital because not "evidenced by a * * * note, * * * mortgage, * * *." Section 719(a)(1) Internal Revenue Code. We have shown, *supra,* that there was no mortgage. Furthermore, the so-called note (R. 39-40) fails to meet the requirements of the statute as the Tax Court properly held (R. 23-24).

A promissory note, as required by Section 35.719-1(a) of Treasury Regulations 112, has been defined as "a written promise to pay a certain sum of money at a future time unconditionally." *Consolidated Goldacres Co.* v. *Commissioner, supra,* p. 544. See also Black's Law Dictionary (1933 ed.) and Bouvier's Law Dictionary (1914 ed.). The term "note" in commercial, as well as common, parlance means a negotiable note [5] (*American Nat. Bank* v. *Marshall,* 122 Kans. 793, 253 Pac. 214; *Road Imp. Dist. No. 4* v. *Southern Trust Co.,* 152 Ark. 422, 239 S.W. 8), but the instrument here, although labelled a note by the taxpayer, lacks several of the characteristics of such an instrument. Secs. 1-4,

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[5] Taxpayer's contention that the so-called note was payable in a reasonable time may be entitled to some weight in determining when an action may be brought on the instrument or when the statute of limitations begins to run, but the reading of "reasonable time" into the instrument will not serve to make it negotiable.

Uniform Negotiable Instruments Act.[6] By its own terms, the instrument provided that the taxpayer "promises to pay to the order of" (R. 16) the payee $400,000, but in the next paragraph there was the proviso that (R. 17)—

> The basis of such principal payments [was] to be $5.00 per thousand commercial log scale for all logs except wood logs cut and removed by purchaser or its agents during the previous calendar month as provided in the agreement between T. A. Peterman and Ida C. Peterman, owners, and Oregon-Washington Plywood Company, purchaser, dated August 30, 1943, covering certain timber lands in Tillamook County, Oregon.

Since the taxpayer was under an obligation to pay a certain sum of money in monthly installments, equal to and *contingent* upon the quantity of timber cut, it is impossible to find an *unconditional* promise to pay a sum certain on demand or at a fixed or determinable future time. As pointed out by the Tax Court, the language providing for monthly payments on the basis of the quantity of timber cut and removed by the taxpayer renders the instrument conditional, and further prevents the amounts of the installments from being fixed. (R. 23-24.) Neither is the date of final payment fixed or determinable since there is no requirement under

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[6] Section 1 of the Uniform Negotiable Instruments Act provides that an instrument to be negotiable must be—

(1) In writing signed by maker or bearer.
(2) An unconditional promise or order to pay a sum certain.
(3) Payable on demand or at a determined fixed time.
(4) Payable to order or to bearer.
(5) Drawee where addressed must be named or otherwise indicated with reasonable certainty.

the two instruments that any particular quantity of timber be cut in a given month.

A case directly in point is that of *Consolidated Goldacres Co.* v. *Commissioner, supra,* wherein the taxpayer contracted to purchase property and pay for it in installments measured by the amount of ore milled at its plant, title to remain in the vendor until the last installment was paid. To insure payment of the price, the contract obligated taxpayer to operate its plant at maximum capacity. The taxpayer included in its borrowed capital the unpaid balance of the purchase price, claiming that its contractual obligation to pay was tantamount to an unconditional indebtedness evidenced by a note. In affirming the Tax Court's exclusion of the item, the court stated (p. 545):

> Since, as pointed out by the Tax Court, the Congress did not define the term "note", we must conclude that it was intended to be used according to its ordinary legal acceptation. *Crane* v. *Commissioner,* 331 U.S. 1, 6, 67 S. Ct. 1047; *Old Colony R. Co.* v. *Commissioner,* 284 U.S. 552, 560, 52 S. Ct. 211, 76 L. Ed. 484. A close analysis of the instruments convinces us that *there was no unconditional promise to pay* a certain sum of money at some future time. Consolidated's obligation under the contract was to pay a certain sum of money in monthly installments, equal to and contingent upon the amount of ore milled at the plant. The plant was to be operated at capacity, and failure to do so would constitute a breach, entitling Western to declare a default, for which it was granted optional remedies. In the event of default, and after the exhaustion of the remedies, Consolidated was liable for any unpaid balance of the purchase price, but

the *obligation thus imposed was not unconditional* and unilateral. (Italics supplied.)

In this case the Tax Court also pointed out that by its terms, the so-called note must be read with its interrelated contract. Under the contract, a breach of the terms by the taxpayer gave the seller the option to declare the contract terminated and all payments forfeited as liquidated damages, or, declare the unpaid sums plus interest due and payable. The taxpayer was obligated to pay the balance of the purchase price but the obligation was not *unconditional* for at any time a breach of the terms and the seller's election to terminate the contract would have relieved the taxpayer of any further liability. From all of the foregoing, it is clear that the second instrument herein involved lacks certain of the necessary elements of a commercial, negotiable note, thus preventing the instrument from qualifying as an evidence of indebtedness as defined by Section 719(a) of the Code and Section 35.719-1 of Treasury Regulations 112.

D. *Taxpayer's failure to sustain burden of proof*

Assuming for the purposes of the argument that the conditional land contract and the so-called note met all the requirements of Section 719(a)(1), it would nevertheless be impossible to compute the borrowed invested capital within the meaning of Section 719(b), because the taxpayer's indebtedness on any particular day would depend upon the total amount of timber cut up to that time. There is no evidence in this case as to the amount of timber cut at any time during the two taxable years. Since taxpayer has failed to sustain its burden of proof, it cannot prevail.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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Assistant Attorney General.
Ellis N. Slack,
Robert B. Ross,
Special Assistants to the Attorney General.

January, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 286512 831

No. 14084

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON PLYWOOD COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-54

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COURT DECISIONS

TEXTS

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No. 14084

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OREGON-WASHINGTON PLYWOOD COMPANY,
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Respondent.

PETITIONER'S REPLY BRIEF

The debt of $400,000.00 is definite and unconditional. It was incurred for a business purpose—the acquisition of timberland situated in the State of Oregon; it is evidenced by a purchase contract recognized and enforceable under the laws of Oregon as a common form of purchase price mortgage, and by a promissory note. The statement in respondent's brief (p. 12) reading "Both (referring to the purchase contract and the note)

provide that the $400,000.00 balance was to be paid at the rate of $5 per thousand feet * * * for all logs except wood logs cut and removed by the taxpayer or its agents during the previous calendar month" is not correct, and is misleading. In the contract (Ex. 1, R. 31) petitioner agreed unconditionally to pay $500,000.00 for the timberland; $100,000.00 was paid in cash on or prior to September 30, 1943, and petitioner's note (Ex. 2, R. 39) was given for the balance. The note reads in part:

> "* * * the undersigned (petitioner) for value received promises to pay the order of Peterman Manufacturing Company the sum of Four Hundred Thousand Dollars ($400,000.00) in lawful money of the United States of America."

The note was given for an agreed existing indebtedness of $400,000.00. The promise to pay that specific amount was in no way qualified or made to depend upon any future condition or contingency. Had the note ended with the quoted part, the full amount would have been payable on demand.

The second clause reads:

> "Payments on this note plus accrued interest at the rate of 3% per annum on deferred balance shall be made on the 15th day of each month beginning November 15, 1943."

The third clause reads:

> "The basis of such principal payments to be $5.00 per thousand feet * * * for all logs except wood logs cut and removed by purchaser (petitioner) or its agents during the previous calendar month * * *."

The last clause provides the means of determining the amount to be paid on the principal monthly and also served to protect the security reserved by the purchase contract. It in no way weakens or qualifies the antecedent promise to pay the full sum of $400,000.00. The monthly payments were not for logs cut and removed, but were to apply on the gross indebtedness for the "timberland" including the land as well as the timber. The existing debt should be kept distinct from the method of determining the amount of the monthly payments. Clearly it was not the intention of the parties to limit petitioner's obligation to pay the full $400,000.00 to the quantity of timber removed from the land. This is evident from the clause in the purchase contract providing that "no loss or destruction of, nor injury or damage to any part or all of the property * * * shall relieve the purchaser * * * from any of the obligations imposed on or assumed by it" (R. 33). There is a clear distinction between a promise to pay an existing debt of a specific amount without qualifications or conditions at a time to be determined by subsequent events, and a promise to pay a designated amount on the happening of specified events. When one promises to pay an existing debt in a fixed amount, as in this case, and the *time of payment* is to be determined by subsequent events and the events do not or for some reason cannot occur, the law implies an obligation to pay within a reasonable time (Authorities Appendix 2, pp. 30-35, petitioner's brief).

DEFINITION OF NOTE. The Tax Court in *Journal Publishing Co. v. Commissioner* (3 T.C. 518) defined a note within the meaning of section 719 R.C., as

"a written promise to pay a certain sum of money at a future time unconditionally." That definition was quoted with apparent approval in *Consolidated Gold Acres Co. v. Commissioner,* 165 Fed. 2d 94 (C.A. 10). This note comes clearly within the definition promulgated by The Tax Court.

THE MORTGAGE. No attempt will be made to distinguish the Court decisions cited by Respondent on this subject. Congress did not attempt to define a mortgage, probably for the reason that the forms and nature differ in many of the states of the Union. In a few of the states the common law form which passes the title to the property mortgaged prevails with slight modifications. In some the form is provided by statute. In some the instrument passes the legal title and may provide the method of foreclosure. The form and effect vary as to detail in many of the states. One cannot say there is any general form. The form and effect of mortgages is regulated by the states in which the property is situated. The essential characteristic of all is that the instrument creates a lien on the property described therein for the security of a debt or the performance of some obligation which may be enforced against the property. Mortgages or liens on real property are construed and enforced according to the laws of the state in which the property is situated (See generally 41 C.J., pp. 273-280; 59 C.J.S., pp. 24-29; 36 Am. Jur., p. 690). Congress intended that any instrument which creates a lien on a taxpayer's real property to secure a debt of the taxpayer which may be treated and foreclosed as a mortgage by the courts of the state in which the property is situated, is a mortgage

within the meaning of section 719 R.C. The purchase contract, Exhibit 1, could, under the laws of Oregon, in the event of petitioner's failure to pay the debt, be foreclosed, the property sold and proceeds of sale applied on the debt, in exactly the same manner as any other form of a purchase price mortgage (See petitioner's brief, pp. 26-29). The fact that the mortgagee may have had the alternative remedy of a "strict" foreclosure does not make the instrument any the less a mortgage. The right to foreclose as a mortgage does not have to be the exclusive remedy.

COURT DECISIONS RELIED UPON BY RESPONDENT NOT APPLICABLE TO THIS CASE

In *Consolidated Gold Acres v. Commissioner,* 165 Fed. 2d 542, the obligation was not evidenced by a note. The Court held the contract not to be a mortgage under the Nevada laws; that the obligation to pay was not unconditional. In *Benard Realty Co. v. U. S.,* 188 Fed. 2d 861, the debt was not evidenced by a note, the Court held the purchase contract not to be a mortgage under the laws of Wisconsin where the property was situated; that the obligation to pay was not unconditional; that the vendor during the taxable year had the obligation of satisfying a mortgage outstanding against the property to be purchased; of paying the taxes on the property from funds to be contributed by the taxpayer, and conveying clear title. In *Frankel v. Commissioner,* 167 Fed. 2d 94, the obligation was not evidenced by a note and was

not unconditional. In the other cases cited, the facts differ materially from the facts in this case. It would only burden the Court to distinguish them in this brief.

When the purchase contract was executed, $100,000.00 paid on the purchase price and petitioner's note given for the balance, the purchase and sales contract was completed so far as the vendors and the payees of the note were concerned. Petitioner's obligation to pay the note became complete. Neither the vendors or the payees of the note had one thing to do until the note was paid in full.

ALTERNATIVE REMEDIES OF THE VENDORS

The fact that the vendors had the alternative remedy of declaring a forfeiture and recovering the property in the event of petitioner's failure to pay, instead of bringing suit to recover on the note, did not affect petitioner's liability on the note. The statute (Sec. 719 R.C.) does not require that the note or the mortgage must be the exclusive remedy of the creditor. The fact that the taxpayer owes a debt incurred for a business purpose and the debt is evidenced by either a note or mortgage, is all that is required. The Court cannot read into the statute that the taxpayer must go further and show that the owner of the mortgage or note has no other remedy or that the owner will enforce payment of same. Neither does the fact that the vendors might have had a strict foreclosure of the purchase contract instead

of exercising their right to have it foreclosed as a common form purchase mortgage deprive the instrument of the characteristics of a mortgage. The debt and the right to enforce payment through the instrumentality or a note or mortgage is all that is required.

NO QUESTION OF COMPUTATION OF THE TAX INVOLVED

Before this case reached The Tax Court counsel for petitioner and the Commissioner made a sincere effort to stipulate all the material facts and confine the issue to the point of whether the purchase contract and note, considered alone or in connection with the other stipulated facts, created and evidenced an indebtedness of the petitioner for borrowed invested capital within the meaning of section 719 of the Revenue Code. It is stipulated if they did, 50 per cent of the average daily balances owing on the indebtedness during the year 1944, was $171,974.05 and during the year 1945, $130,746.55, and there would be no deficiency excess profit tax. If they do not, there would be a deficiency as determined by the Commissioner in the amount of $19,925.35, and if the deficiency should be affirmed by the Court it would result in an overassessment in petitioner's income tax for the year 1944 in the amount of $9,321.80. There was never any question about the correctness of the computation of the tax. The sole question is whether the indebtedness, as above stated, was for borrowed invested capital within the meaning of the Code (R. 26-27). The sufficiency of the stipulation was not raised in The Tax

Court. There was no necessity for proving the quantity of timber removed from the land during the years 1944 or 1945 or at any time (pages 10 and 24, respondent's brief).

Respectfully submitted,

GEORGE J. PERKINS,
Attorney for Petitioner.

No. 14086

United States Court of Appeals

for the Ninth Circuit

STEPHEN KONG, JR.,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-22-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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*Page numbering appearing at foot of page of original Certified Transcript of Record.

In the United States District Court
for the District of Hawaii

Cr. No. 10,704

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEPHEN KONG, JR.,

Defendant.

INDICTMENT

(18, U.S.C., Section 1503)

The Grand Jury charges:

That on or about November 8, 1952, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Stephen Kong, Jr., did endeavor to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence, intimidate and impede Samson Nani Peneku, the said Samson Nani Peneku being then and there a trial juror duly impaneled and sworn in the case of United States vs. Charles Fujimoto, et al., Cr. No. 10,495, pending in the United States District Court for the

Territory of Hawaii, in violation of Section 1503, Title 18, United States Code.

Dated: Honolulu, T. H., this 18th day of February, 1953.

A True Bill.

/s/ GEORGE D. SCOTT,
Foreman, Grand Jury.

/s/ A. WM. BARLOW,
United States Attorney.

Presented in Open Court February 18, 1953.

[Endorsed]: Filed February 18, 1953. [3]

PROCEEDINGS WITH REFERENCE TO INDICTMENT

Conference at Bench—February 18, 1953

The Court: With respect to this case, you are inviting my attention——

Mr. Barlow: I am inviting attention to an indictment that has been returned against Steven Kong, Jr., and ask at this time that the indictment be placed on the secret file for the following reasons: The individual who had been approached in this matter was a man by the name of Peneku. At the time he was approached he was duly impaneled to serve as a juror in the Fujimoto-Smith Act trial which is now in progress before Judge Jon Wiig, and in order that the government can never be

accused of creating a climate that perhaps may be prejudicial to any of the defendants, the government at this time would like to have the matter put in the secret file until such time as the Smith Act case before Judge Wiig is terminated.

The Court: Very well. Although it does not fit squarely within the technical provisions of Rule 6 (e), I will nevertheless grant the request in view of the fact that it is the government that asks for it and assumes the responsibility of the man fleeing the jurisdiction before the indictment is released from the secret file.

Mr. Barlow: Thank you.

The Court: And as soon as that particular case, so-called Smith Act case, is over, that is over in the legal sense, in this court exclusive of any appeals.

Mr. Barlow: That is right, your Honor.

The Court: This indictment then automatically comes off the secret file.

Mr. Barlow: Thank you, sir.

February 20, 1953.

/s/ DOROTHY M. WOLFE,
Official Court Reporter. [4]

The United States District Court
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF
FEBRUARY 18, 1953

The grand jurors appeared in a body and through their foreman, Mr. George J. Scott, in the presence of Mr. A. William Barlow, United States District Attorney, returned an Indictment charging the defendant above named with violation of Section 1503, Title 18, United States Code.

Upon request of Mr. Barlow, the Court ordered the Indictment placed on secret file. [5]

The United States District Court
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF
JULY 15, 1953

On this day came Mr. A. William Barlow, United States District Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for hearing on motion to dismiss.

Following argument by respective counsel, the motion to dismiss was denied by the Court.

Hearing on motion for bill of particulars was set for July 20, 1953, at 1:30 p.m. [6]

The United States District Court
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF
JULY 20, 1953

On this day came Mr. A. William Barlow, United States District Attorney, and also came Mr. O. P. Soares, counsel for the defendant herein. This case was called for hearing on motion for bill of particulars.

The motion was submitted without argument and was granted by the Court as to Item No. 2, Items Nos. 1 and 3 in part only.

The Court ordered the bill of particulars furnished the defendant by July 24, 1953, at 4 p.m., and this case was ordered continued to July 29, 1953, at 2 p.m., for plea. [7]

The United States District Court
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF
AUGUST 14, 1953

On this day came Mr. Nat Richardson, Jr., Assistant United States District Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for trial.

The parties being ready, the following jurors were drawn to fill the jury box:

Marvin Bainbridge

Stella M. Humphrey
Edward C. Respicio
Francis K. Akana, Jr.
Mary S. Teves
Gertrude Nihipali
Dorothy G. Fantasia
Solomon K. Lalakea
Muriel M. Huddy
Albert F. Soon
Samuel L. Chastain
Frank T. Rania

Respective counsel having waived all peremptory challenges and the jury being satisfactory, the above-named jurors were sworn at 9:37 a.m. to try the issues in this case.

Motion made by Mr. Soares to exclude all witnesses from the courtroom was denied by the Court.

Opening statement was made by Mr. Richardson.

At 10:05 a.m., Mr. Samson N. Peneku was called and sworn and testified on behalf of the plaintiff.

At 11:06 a.m., Mrs. Emma H. Peneku was called and sworn and testified on behalf of the plaintiff.

At 11:36 a.m., the plaintiff rested.

At 11:49 a.m., Mr. Stephen Kong, Jr., was called and sworn and testified on his own behalf.

At 12:02 p.m., the Court ordered this case continued to 2 p.m. this day for further trial.

At 2:05 p.m., the witness Kong resumed the witness stand and testified further.

At 2:43 p.m., the defendant rested.

At 2:45 p.m., Mrs. Minnie Kong was called and sworn and testified on behalf of the plaintiff.

At 3:23 p.m., both sides rested.

At 3:25 p.m., the Court ordered this case continued to August 17, 1953, at 10 a.m. for further trial, respective counsel to settle instructions at 8:30 a.m. on August 17, 1953. [8]

The United States District Court
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF
AUGUST 17, 1953

On this day came Mr. Nat Richardson, Jr., Assistant United States District Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for hearing on the settlement of instructions and for further trial.

Motions for the government to elect under which charge it was proceeding and for judgment of acquittal were made and argument was had thereon by Mr. Soares, following which the motions were denied by the Court.

At 10:03 a.m., in chambers, further hearing was had on the matter of instructions.

At 10:11 a.m, in open court, it was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

Motions for the government to elect and for judgment of acquittal were renewed by Mr. Soares and were denied by the Court.

At 10:16 a.m., argument was had by Mr. Richardson.

At 10:24 a.m., argument was had by Mr. Soares, followed by Mr. Richardson in his closing argument at 11:08 a.m.

At 11:13 a.m., the Court instructed the jury.

At 11:49 a.m., the jury was excused from the courtroom and Mr. Soares excepted to the Court's instructions.

At 11:52 a.m., the jury returned to the courtroom and was further instructed by the Court.

At 12 noon, Mrs. Lily L. M. Deering, Special Bailiff, and Mr. Harry T. Tanaka, Court Crier, were sworn as bailiffs to take charge of the jury during its deliberations.

At 12:05 p.m., the jury proceeded to lunch, returning at 1:30 p.m. to deliberate upon a verdict herein.

At 5:40 p.m., pursuant to its request, the jury returned to the courtroom and was further instructed by the Court.

At 5:47 p.m., the jury retired to deliberate further.

At 6:20 p.m., the jury proceeded to dinner, returning at 7:30 p.m. to deliberate further.

At 9:25 p.m., the jury returned to the courtroom and in the presence of respective counsel and the defendant and through its foreman returned the following verdict of guilty which was ordered placed on file:

"We, the Jury, duly empaneled and sworn in the

above-entitled cause, do hereby find the defendant, Stephen Kong, Guilty as charged in the Indictment herein.

"Dated: Honolulu, T. H., this 17th day of August, 1953.

"/s/ SAMUEL L. CHASTAIN,
"Foreman."

Upon the verdict of guilty, the Court adjudged the defendant guilty as charged in the Indictment and ordered this case continued for presentence investigation, the defendant to report to the Probation Officer on August 18, 1953, at 9 a.m.

Bond was set in the sum of $1,000.00 and the defendant was allowed until August 18, 1953, at 4 p.m., to file the bond. [9]

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

Comes now the United States of America, by A. William Barlow, United States Attorney for the District of Hawaii, and respectfully requests the Court to give to the jury the following instructions.

Dated: Honolulu, T. H., this 17th day of August, 1953.

UNITED STATES OF AMERICA,
Plaintiff;

A. WILLIAM BARLOW,
United States Attorney,
District of Hawaii;

By /s/ NAT RICHARDSON, JR.,
Asst. United States Attorney,
District of Hawaii. [11]

Instruction No. 1

It is not necessary for the government to show that anyone attempting to influence a juror be successful in his attempt.

If you find beyond reasonable doubt that Stephen Kong did endeavor, or try to influence Samson N. Peneku in any way concerning his duties as a trial juror in the case of United States vs. Charles Fujimoto, et al., then you must convict.

Denied as submitt., but OK as to parg. No. 1.

Given as to parg. No. 1.

/s/ J. F. Mc. [12]

DEFENDANT'S REQUESTED INSTRUCTIONS

Instruction No. 1

You cannot find the defendant guilty unless you are unanimously agreed that Stephen Kong corruptly endeavored to influence, obstruct, *and impede the discharge of Mr. P's duty as a trial juror in U. S. v. Fujimoto, Cr. No. ....., in this Ct. then pending,** or impede the due administration of justice.

The mere request by defendant made to a juror to vote not guilty as a favor to the person making the request, he not being a party to, nor having a personal interest in the case on trial, will not warrant finding defendant guilty.

Denied as submitted.

Given as amended as to parg. 1 only.

/s/ J. F. Mc. [13]

Instruction No. 2

If you cannot unanimously say that you believe from the evidence that defendant's purpose in speaking to the juror Peneku was corrupt and that in doing so he was endeavoring to influence, obstruct, or impede the due administration of justice, your verdict must be not guilty.

Denied—as motive not an element.

Amend to use word purpose.

Will instruct that corrupt=Cr. intent. [14]

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*[Matter set in italics appeared as an alteration on original.]

Instruction No. 3

The word "Endeavor" as used in the statute and in the indictment means more than a simple request unaccompanied by any effort or inducement to have the request granted.

Denied.

U. S.-Russell, 255 U.S. 138, 143. [15]

Instruction No. 4

The word "endeavor" is distinguished from synonomous words such as "attempt" or "effort" by the fact that the synonomous words relate to a single act whereas the word "endeavor" means a continued series of acts.

Denied.

See U. S. v. Russell. [16]

District Court of the United States for the District of Hawaii Division

Cr. No. 10,704

UNITED STATES OF AMERICA

vs.

STEPHEN KONG

JUDGMENT AND COMMITMENT

On this 4th day of September, 1953, came the attorney for the government, and the defendant appeared in person and by counsel, O. P. Soares, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of endeavoring to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, feloniously and corruptly endeavor to influence, intimidate and impede Samson Nani Peneku, the said Samson Nani Peneku being then and there a trial juror duly impaneled and sworn in the case of United States vs. Charles Fujimoto, et al., Cr. No. 10,495, pending the United States District Court for the Territory of Hawaii, in violation of Section 1503, Title 18, United States Code, as charged, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years.

Mittimus ordered stayed until September 14, 1953.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the

United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

/s/ WM. F. THOMPSON, JR.,
Clerk. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Stephen Kong, Jr., Heeia, Oahu, or c/o P. O. Box 2702, Honolulu, Hawaii.

Name and address of appellant's attorney: O. P. Soares, 1023 Union Trust Building, Honolulu, Hawaii.

Offense: Endeavoring to influence, obstruct and impede the due administration of justice in violation of Section 1503, Title 18, United States Code.

Statement of judgment and order: Pursuant to verdict theretofore rendered, the Honorable J. Frank McLaughlin, Chief Judge of the above-entitled Court, on the 4th day of September, 1953, adjudged defendant guilty and sentenced him to imprisonment for three years.

Appellant is now at liberty on duly approved bond in the sum of $1,000.00 awaiting disposition of his motion to be released on bail pending appeal.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit.

Dated: Honolulu, Hawaii, September 11, 1953.

STEPHEN KONG, JR.,
Appellant.

/s/ O. P. SOARES,
Appellant's Attorney.

[Endorsed]: Filed September 11, 1953. [19]

[Title of District Court and Cause.]

BOND

Know All Men by These Presents:

That we, Stephen Kong, as Principal, and Edmund C. Paik, as Surety, are held and firmly bound unto the United States of America in the full sum of One Thousand Dollars ($1,000.00) for the payment of which well and truly to be made, we do bind ourselves, our executors and administrators, jointly and severally by these presents;

Whereas, lately, in the District Court for the United States in and for the District and Territory of Hawaii, judgment and sentence were made and entered against Stephen Kong, Defendant above named, and

Whereas, notice has been given of appeal to the United States Court of Appeals for the Ninth

Judicial Circuit, to secure a reversal of said judgment and sentence, and

Whereas, the Honorable J. Frank McLaughlin, Judge of said District Court, did regularly order that bail bond be given in the sum of One Thousand Dollars ($1,000.00) pending said appeal,

Now, Therefore, the condition of the above obligation is such that if the said Stephen Kong shall appear here in person or by attorney in the United States Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute his appeal and shall abide by and obey all orders [21] made by said Appellate Court in said cause, and shall pay any damages and all costs imposed by the judgment of said District Court against him, and shall surrender himself in execution of the judgment and sentence appealed from as said Circuit Court may direct, if the judgment and sentence against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the judgment and sentence made against him shall be reversed by said Circuit Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above bounden Principal and Sureties have hereto affixed their hands this 12th day of September, 1953.

/s/ STEPHEN KONG,
Principal.

/s/ EDMUND C. PAIK,
Surety.

Taken and acknowledged before me this 12th day of September, 1953.

[Seal] /s/ THOS. S. CUMMINS,
Deputy Clerk, United States District Court.

Approved as to Form:

/s/ A. WM. BARLOW,
United States Attorney.

Approved as to the Amount and Sufficiency of Surety:

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court.

[Endorsed]: Filed September 14, 1953. [22]

In the United States District Court
for the District of Hawaii

Criminal No. 10,704

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEPHEN KONG, JR.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the United States District Court, Honolulu, T. H., on Wednesday, July 15, 1953, on motion to dismiss the indictment.

Before: Hon. J. Frank McLaughlin, Judge.

Appearances:

O. P. SOARES, ESQ.,

Appearing for Defendant.

A. WM. BARLOW, ESQ.,
United States Attorney,

Appearing for Plaintiff.

The Clerk: Criminal No. 10,704, United States of America vs. Stephen Kong, Jr., for hearing on motion to dismiss indictment.

Mr. Soares: I am ready.

Mr. Barlow: Ready.

The Court: All right. Mr. Soares, you and your client are ready and the client present?

Mr. Soares: This is a motion to dismiss the indictment on three grounds, the first of which is that the defendant has been in jeopardy over this same offense. There is no dispute of the facts as set up in the defendant's affidavit in support of the motion. The jeopardy to which we refer, if the Court please, is his response and appearance before Judge Wiig on an Order to Show Cause, in which it was alleged that he has obstructed or impeded justice. In other words, the exact language of the indictment, the administration of justice, except, of course, that the matter before Judge Wiig was in the nature of contempt proceedings, whereas the matter, of course, here is a felony as described in the statute and as to which an indictment was returned. We take the position, however, may it please the Court, that the jeopardy is the same. In other words, it is slightly different in our view from the situation in which a defendant has been indicted in a state or territorial court of an offense and then indicted [*1] in the federal court of the same offense where the jurisdictions are different but where the power before whom the defendant has twice been ordered to appear is derived from the same source.

The other was simply a matter of contempt proceedings, but for the same facts, and we submit that

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

that is the test, it is the identity of the act and the same. Or I think some of the cases have phrased it as, would the decision in the second proceeding negative the action in the first? In other words, the mere fact that he was hailed before the Court for contempt doesn't follow the situation that the contempt consisted of his impeding the due administration of justice. And in this case it is the same thing, impeding the due administration of justice. It is illustrated by a case, an old case, that took place in the Phillipines, in which a man was acquitted by a court martial of the crime of homicide —I think it was called—because as we know court martials have not assessed capital punishment, having been acquitted by the court martial the Phillipine authorities had him indicted, charged with what they called assassination and convicted him, incidentally. The matter was taken before the Supreme Court. The Supreme Court there held that the test was not two separate jurisdictions but the two bodies which took part in the proceeding derived their power from the same source and that therefore the indictment by the Phillipine government was not authorized and the conviction was set aside. That is as to the first [2] ground of the motion.

As to the second ground, we complain that the defendant, to proceeding this case, it would be depriving the defendant of his right guaranteed under the constitution of a speedy trial.

I am frank to say, if the Court please, after a more or less exhaustive search, that it has not re-

vealed any case in which the facts are similar to this. All the cases that I have been able to encounter have been instances where the man was first indicted and then a delay in his prosecution which resulted sometimes in the indictments being dismissed because the trial was not speedy. At other times, the motion for dismissal being denied either because the defendant himself had waived the right to a speedy trial—but this seems to me—and I may be mistaken—it seems to me a case of the first instance where the man was indicted and then was deprived of any opportunity for a trial because the indictment was placed in the secret file. He couldn't prepare for a trial. He couldn't ask for a trial.

The Court: Well, is the principle that you advert to relevant until you have an issue to try?

Mr. Soares: Yes, there was an issue to try. That is his guilt of this crime. And he was indicted.

The Court: There has been no plea.

Mr. Soares: That is true. There is an issue to try. [3] The case itself is not an issue. But the issue—let us use the legal phraseology—the issue has not been joined, but the issue has been set up.

The Court: Is the right to a speedy trial an absolute right?

Mr. Soares: Yes, yes, as I understand it, if the Court please. It says, as I remember it, that all persons shall enjoy the privilege or right of a speedy trial. Now, that is absolute. He could waive it, it is true, but it is not one that the government can take away. And it is especially vicious in this case, if the Court please, from the defendant's point of view

because of the reasons which actuated the government to ask that this indictment be placed on the secret file.

Now, I think it will be conceded that the purpose of placing indictments in the secret file is to keep the accused from being forewarned and perhaps escaping, escaping the execution of a bench warrant, or the process by which he is brought into Court.

Here the government said or asked the Court to deprive this man of his right for a speedy trial because, forsooth, the government did not wish to be accused of creating an unfavorable atmosphere or climate—I think that was the word they used—in an entirely different case. In other words, the Smith Act case was on trial. And the government was willing to deprive this defendant of his constitutional right [4] right because they didn't want to be criticized later on.

Now, I respectfully submit that it is highly improper that one's constitutional rights should be overlooked or set aside or ignored merely because somebody else might complain that the government is being unfair to them when there is no connection between their being required to answer to the Court and this defendant. It is true that the statute does say——

The Court: Is there any proposition of the government being fair to itself?

Mr. Soares: No, the government is not an entity different from a citizen whose right is guaranteed.

We cannot say this is the government and therefore it is entitled to a certain consideration. And that is a citizen and therefore he is not entitled to consideration. The government has no right as such. It is the people who have the rights.

The Court: Well, the government represents the people.

Mr. Soares: In this case they misrepresented the people.

The Court: Well, does not the public have some rights?

Mr. Soares: And this defendant is one of the public. They have no rights in opposition to the constitutional rights, if the Court please.

The Court: Well, they have the public speaking [5] through its government and have rights as against a defendant in a criminal case.

Mr. Soares: No. I submit not. Some of the courts have gone so far as to say that the government has to choose if there is a conflict between one person's constitutional right and a prosecution or a government right, the government has to choose which it thinks or cannot choose one as against another's constitution right and must forego the other, but there is nothing superior to the right guaranteed by the constitution.

The Court: You don't believe that the overall considerations of the best interests of justice repose in a Court's discretion as to whether or not an indictment should be kept in the interests of justice in the secret file and whether there should be a file if it didn't remain in the secret file?

Mr. Soares: I take the position that you cannot deprive one person of a constitutional right that is not in conflict with the rights of others but simply a matter of policy on the part of the government. Now, it is quite clear from a perusal of Mr. Barlow's remarks exactly what happened. And it is the kind of thing I don't hestitate to state that has happened too often in the Territory of Hawaii with regard to these very same people and their ilk, where they lean over backwards to avoid criticism by the ILWU or even the Communists [6] when they haven't any greater right than anybody else. And in passing I might say that it is strange that they who are so vocal in their insistence on the constitutional rights being observed to the very letter of the law when their individual rights are concerned are quite willing that the individual rights of others might be ridden rough shod and that is precisely what has happened here.

Whatever background there is to the government's request that this indictment be placed in the secret file, the fact remains that the statement was made not that in fact the government would be hampered in its prosecution of the Smith Act case, not in fact that to let it be known to the defendant that he had been indicted would have probably or even possibly resulted in a miscarriage of justice in other cases——

The Court: But supposing the situation such as this resulted not from the government's request but from the Court's own feeling about the matter in the best interest of justice?

Mr. Soares: Well, the principle would not be changed, if the Court please.

The Court: Well, you keep referring to the government here, of course.

Mr. Soares: Well, I mean the prosecution.

The Court: You think that there is an absolute right [7] to a speedy trial?

Mr. Soares: I don't see how language could be clearer or more specific, if the Court please.

The Court: Isn't it a relative right, a qualified right?

Mr. Soares: It is a right granted without qualifications.

The Court: But supposing both judges of this Court dropped dead, supposing we had a plague here and all the jurors had some disease and we couldn't have a trial?

Mr. Soares: That would determine what was or was not a speedy trial.

The Court: Well, speedy under given circumstances.

Mr. Soares: Yes, exactly, under proper circumstances. In other words, a government, a prosecutor might wait until the very last day of the statute of limitations to file his indictment and have it returned. Now, the defendant couldn't complain that he had not been indicted earlier. We have a Territorial law which I have argued unsuccessfully, which was in my belief designed to take care of that kind of a situation, but that is not what we are confronted with here now. Had the government elected to withhold presenting this matter to the Grand

Jury, then we couldn't complain, whatever the reasons may have been. But they didn't. There had been this period of time during which the defendant knew nothing about [8] the existence of this indictment. And we don't know and I submit it is immaterial what witnesses he may have had that will not be available to him now because of the delay or whatever other prejudice there may have been.

The Court: Well, that is speculative. Have you any evidence to offer that because of the alleged delay he has lost the advantage of having certain witnesses?

Mr. Soares: No, if the Court please. I am just pointing out the reason for the rule. And a very, very learned judge of the federal court, not to make a play on words, in a very important case said that it didn't make any difference. I quoted that language because it seemed to me so significant, if the Court please. I made a note of it wherein he said—and this is Mr. Learned Hand in the Coplon case——

"In truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal——"

This had to do with the examination of some records.

"——but we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor."

The Court: Well, there is also a case that has

a little more age to it, United States vs. Holmes, 168 Fed. (2d) 888, Third Circuit, 1948, where on this point which is a little bit different than the one in consideration of the Coplon case, Judge O'Connell stated at page 891 as follows: [9]

"In the complete absence of any indication that the instant defendant was adversely affected in the preparation or prosecution of his defense by the lack of time in bringing this case to trial, we can see no ground for complaint by defendant on that score."

That is why I asked you if you had any proof to offer——

Mr. Soares: I take the position of Mr. Justice Hand, that we don't need any proof except to demonstrate that he has been deprived of a right, through no fault of his own.

The Court: The last time I followed Mr. Justice Hand, I got reversed.

Mr. Soares: Well, I am not expressing any wishes now. I hoped to dispose of this case in this Court.

The Court: But I admire him greatly.

Mr. Soares: But there it is. The thing that arouses me so much, if the Court pleases, perhaps is emotional rather than legal. But it is for the purpose of assisting because that is what it amounts to, people who the government knew and the jury later found were not deserving of any but the strictest compliance with the law, this man—well, to use some uncourtly language—was made the goat by having this placed in the secret file.

I just want to emphasize one more point in that connection, and that is with reference to the language of the [10] statute. It is true that the statute does say that the Court may place the indictment in the secret file, but I think it is clear it is meant in those cases where the defendants are still to be apprehended, because the language of the rule itself——

The Court: Before you get to that point, did you run across this old case in this court that my law clerk dug up in 3 Hawaiian Reports of the U.S. District Court for Hawaii where I am advised by him the facts are somewhat like these? It is where a man was indicted in 1904 and they found him in 1909, but he had not been hiding. He had been working every day, but for some reason or other the Marshal couldn't find him. And he interposed this claim that you here assert, namely, that he had been deprived of a speedy trial. He was successful.

Mr. Soares: I am going to show the distinction, however, which makes this case stronger. There the indictment was known to the world, and I am not familiar with the case, but I am trying to say because I have never been in sympathy with the Hawaiian Reports of the U.S. District Court because they purport to be reports of a court that wasn't even a court. I mean not a District Court like the Ninth Circuit as the Supreme Court of the United States has ruled. But certain people took pride in their decisions and had certain inferences which they let the legislature make. Incidentally, [11]

those reports were not published by the federal court. The Territorial tax payers footed the bill for federal purposes. But that is neither here nor there. The fact remains that even then——

The Court: You weren't the reporter in this case?

Mr. Soares: No. I was only fourteen years old, thirteen years old.

The Court: There is a difference in the facts, yes. But I think as a relic of the past you might be interested.

Mr. Soares: Yes, I am glad to have your Honor's point—I am glad to have your Honor point that out. I am going to read that.

The Court: I will give you the exact citation which my industrious law clerk found. It is 3 U.S. District Court, Hawaii Reports, 381, year 1909, U. S. vs. Kojima, K-o-j-i-m-a.

Mr. Soares: That leaves me with one other ground of the motion, if the Court please, and that is that the indictment does not charge an offense against the United States. In a presentation I made to your Honor not long ago about a statute describing what amounts to a number of separate offenses, but where the punishment can be for only one, your Honor will recall the Charles case. But this statute describes as I have computed them six means by which it may be violated. The first one relates to influencing and intimidating and impeding witnesses. The next is impeding, influencing jurors or other officers of the court. The next is with reference to

injury [12] of parties or witnesses and/or with the jury for either finding an indictment or returning a verdict. And then injuring an officer. Now, none of those is described in this indictment. What is described in this indictment is the influencing and obstructing or impeding of the due administration of justice.

Now, we say the indictment is insufficient for two reasons: First, it does not indicate that justice was being administered or the impediment of justice sought to be administered was in any pending case which I believe to be a requisite of the offense. And the next is that unlike the other instances where the influence and intimidation is sufficient no matter how made, here it must be in the case of the obstructing of the due administration of justice, it must be by threat or force or by threatening letters or communications. And there is no indication in the indictment anywhere that the defendant's effort to obstruct justice was by the use of threats, force or threatening language, threatening letters or other communication.

The Court: Have you a familiarity with the case of Hicks vs. United States, 173 Fed. (2nd) 570, Fourth Circuit?

Mr. Soares: No, I do not.

The Court: There the argument that you advance was rejected and, in other words, the words of the statute were held sufficient.

Mr. Soares: But we complain it is not in the words [13] of the statute. The words of the statute are by force—let's see now——

The Court: Corruptly or by threats or by force.

Mr. Soares: By threats or force or by threatening letters or communications.

The Court: Anyone of those.

Mr. Soares: And as that language appears, is there any indication in this present indictment, if the Court please?

The Court: Of what?

Mr. Soares: Of threats, of force, and so on, as to the due administration of justice?

The Court: Well, it has never been required by the government to allege the evidence.

Mr. Soares: But if it had been a charge of attempting to intimidate, influence or impede, if I get the order properly, the juror in the discharge of his duty—the indictment would have been sufficient, but that isn't the charge. The charge is impeding the due administration of justice. And under the language of the statute, as I construe it, the impeding of the due administration of justice must be by threats, or force or by threatening letters or communications. There is a distinction. That is the distinction I am trying to draw.

The Court: All right. Mr. Barlow, it seems you are out in the left field.

Mr. Barlow: I will be back in center soon. [14] I will take them in the inverse order in which Mr. Soares argued the matter. Apparently Mr. Soares in reading the statute, section 1503, has either conveniently or otherwise overlooked the word "corruptly." And the indictment does allege that Kong

did endeavor to influence, obstruct and impede the due administration of justice in that he knowingly, wilfully, unlawfully, feloniously and corruptly endeavored to influence, intimidate and impede the said Peneku. And Mr. Soares says that there is no indication as to what Peneku was doing at the time, that he was a juror or anything else. And the indictment definitely states that he did corruptly endeavor to influence, intimidate and impede Peneku, the said Peneku being then and there a trial juror duly impaneled and sworn in the case of so and so pending in the U. S. District Court for the Territory of Hawaii.

All the elements of the statute are incorporated in the indictment. All the elements that Mr. Soares says are not incorporated, if he reads it carefully, are incorporated. Every single, solitary element of this charge is incorporated in this indictment. It is in the wording and language of the statute and the cases are legion which hold that you do not have to go any further than that. If you allege in the words of the statute, that is all you have to do. And your Honor has cited the Hicks case which in the opinion of the government is exactly in point.

Now, we will go on to points Nos. 1 and 2. I [15] will take them in the order of the motion by Mr. Soares.

The defendant moves that the indictment against him, now filed in the above-entitled matter, be dismissed because he has been in jeopardy of conviction of the offense charged.

Now, I don't know whether Mr. Soares has taken

the time to look through the record, but if he did, in Miscellaneous No. 481, in the matter of Stephen Kong, before the Honorable Jon Wiig, it reads as follows——

The Court: I am familiar with it.

Mr. Barlow: You have it, sir?

The Court: I have the file here.

Mr. Barlow: And the Court there told Mr. Kong that in order that the present trial continue, that he, of his own motion, was dismissing the Order to Show Case, that he was referring the matter to the United States Attorney for appropriate action.

The Court: Mr. Soares' point, however, is that he had been in jeopardy of being found in contempt, that the matter had been started.

Mr. Barlow: Well, your Honor, I think if Mr. Soares would have gone to the case he would have found two cases exactly in point where a Court has held, in O'Malley vs. United States——

The Court: That is 128 Fed. (2nd), reversed on another ground. [16]

Mr. Barlow: That was reversed on the point involving the statute of limitations.

The Court: My law clerk found that, too.

Mr. Barlow: But I will just read the syllabus there and I think that should suffice.

"Punishments for contempt of court and on conviction under indictment for the same acts are not within the protection of the constitutional inhibition against 'double jeopardy'."

"Acts of misbehavior constituting violation of the

criminal law may also constitute 'contempt of court' if committed in the presence of the court."

"The power to punish for contempt is inherent in and inseparable from the court hearing a cause."

Now, there is another case which is cited in this case, Merchants' Stock & Grain Co. vs. Board of Trade of City of Chicago, in 201 Federal Reporter. I will just cite syllabus No. 8.

The Court: On what page?

Mr. Barlow: That is page 21.

"Where an act which constitutes a contempt of court is also a crime, it may be punished both by summary action by the court and by indictment, and neither will bar the other."

Now, those cases are directly in point. Mr. Soares has quoted or cited nothing other than an argument. He hasn't referred to the law whatsoever. With relation to count No. 2—— [17]

The Court: Ground No. 2.

Mr. Barlow: ——or ground No. 2, probably I, as an individual, am in sympathy with some of the remarks that Mr. Soares has made to the Court today. But there comes a time when the government in dealing with its citizens must look to the overall good of those citizens, and public justice oftentimes and always should take precedence over private justice. And if your Honor would consult the record in the Fujimoto case, your Honor would discover that it wasn't the government that asked that this matter be put on the secret file. At that time I think it was—well, whatever time it was—Judge Wiig had been assigned the criminal calendar. This was a

matter that would have come before Judge Wiig on the criminal calendar. He is sitting inthe Fujimoto case—he was sitting in that case and had gone into the various aspects of the alleged misbehavior of Mr. Kong, and he made a determination that in the interests of public justice that this matter should be presented to the Grand Jury at that time, because in the interests of justice again the government was interested in conserving testimony.

The Court: That it be presented or be not presented?

Mr. Barlow: No, be presented, that the Judge had asked the government to look into this matter and if it found that there was a possible violation of a statute to then present it to the Grand Jury. And that if the Grand Jury should [18] return an indictment, that that indictment be put in the secret file for reasons which to him at that time were obvious, which to the defendant's counsel were obvious and which the government felt were obvious at the time.

There are many considerations to be taken into account in this matter as to why that indictment was put on the secret calendar. If your Honor recalls, only recently in the Feeney case decided in Boston, the court—I just forget whether it was the Supreme Court or the Circuit Court—decided that because the report that had been made by the Congressional Committee investigating certain matters, a climate or atmosphere was created wherein and whereby certain defendants could not obtain a fair, impartial trial. Now, I think the Court——

The Court: That is the Delaney case. Just last week he went in and pled guilty on one count and was given a year and a day.

Mr. Barlow: That is the Boston case. I think the Court in taking into account the delay, takes into account or should take into account, according to the decisions of the various cases, the facts surrounding the delay, because the delay in time is not enough. In that case that your Honor cited that your law clerk found for you, I think your Honor said there was a delay of five or eight years.

The Court: Five.

Mr. Barlow: Five years. There are several [19] cases that are cited in the books where in four and five years delay has been considered an unnecessary delay in the administration of justice. But if your Honor will consider the facts in this case, the indictment was returned sometime in February. Here it is five months later the defendant can have a trial if he so chooses to go ahead now, providing the court calendar is available, providing it is available for his trial. When you are arguing unreasonable delay, the Court of necessity has to look into all the surrounding circumstances. What is an unreasonable delay? Assuming that Mr. Kong's case had been put on or had been taken off the secret file and had not been put on the secret file—if his indictment was returned in February and he pled in February, it is very reasonable to assume that with the condition of the local calendar he might not have had his day in court yet. His case might still be pending.

The Court: Oh, I doubt if that had been the fact that the case would have been tried. But not for the reason that you ascribed. I seriously doubt if the case had not been on the secret file, if it had been in the regular file and called up for plea and put at issue, if it would have been tried by the Court during the time that the Fujimoto case was under trial in the other division of this court.

Mr. Barlow: I assume from your Honor's remarks that that decision would have been made by the Court.

The Court: Yes. But that is something that didn't [20] happen.

Mr. Barlow: That's right.

The Court: And it also is at variance with Mr. Soares' contention that the defendant has an absolute right to a speedy trial, which doesn't take into consideration the condition of the calendar, the health of the judges, the availability of judges, or the judicial climate or atmosphere.

Mr. Barlow: A climate unfavorable to the defendant.

The Court: To which point you cite the Delaney case in the First Circuit. But what about this contention where Mr. Soares seems to say—to quote him—that it is only the ILWU and their spokesmen who talk about and get what they want because people lean over backwards and are afraid to do other than what they are shouting about?

Mr. Barlow: Well, I doubt that Mr. Soares—I doubt that Mr. Soares really means——

The Court: Well, that isn't the exact quotation of what he said, but it is something like that.

Mr. Barlow: It sounds good, but I doubt that Mr. Soares means what he says, because the government in this case certainly hasn't bent over backwards for anybody. The only backing over that the government has been doing in this case, is to assure each and every person a fair, impartial trial. That is the only backing over or backing that the government has done in any case. [21]

The Court: You mean by that to say that even though the ILWU was not on trial in this Fujimoto case that the government had an obligation, together with the Court, to see to it that the seven defendants on trial in the Fujimoto case had a fair trial.

Mr. Barlow: Your Honor, regardless of race, color, creed, political affiliation, whether you are a capitalist or a labor man, when you step into a federal court, you are entitled to the protection of the federal court. And the mere fact that these people were ILWU or any other labor organization doesn't mean that we should becloud or befuddle the atmosphere and try to creat a so-called climate to engender into the minds of people collateral issues which may or may not influence their thinking or decision.

The Court: Well, then, you have two rights that you have to balance under given circumstances, such as you and I are now talking about. One is the right of the defendant to a speedy trial and the other is the right of defendants on trial to a fair trial.

Mr. Barlow: Plus the fact——

The Court: Which is the bigger right? I have heard it said by people that constitutional rights are absolute rights. Is that so?

Mr. Barlow: No. In my opinion, the right to a speedy trial is a relevant right. You might under certain [22] circumstances—for instance, you go to some of the eastern seaboard states—you are indicted in 1949 and because of the conditions of the calendar, you are lucky if you get tried in 1953. So you have no absolute right to be tried or indicted on Monday and be tried on Wednesday. And then, also, your Honor, we are getting into the realm of a private right and a public right. Which is paramount when you come into a conflict with a public right and a private right?

The Court: Well, Mr. Soares says the right guaranteed to this man by the constitution is paramount, it is an absolute right. If he doesn't get it, he should be set free.

Mr. Barlow: I don't see any cases that Mr. Soares has brought forward to support his contention and I think we are just going around in circles. Let us look at the facts. The facts are that this man was indicted in February. Here it is July. Now, regardless of whether that was only a secret indictment, regardless of whether you were sick or I was sick or there wasn't any United States Attorney acting here, regardless of whether the plague had hit the Islands, is that four or five months an unreasonable delay and has this man suffered anything? As counsel says, he has not. Now, certainly private rights when they conflict with public rights give away to the public rights.

The Court: It is old-fashioned, isn't it?

Mr. Barlow: It might be old-fashioned, but [23] it is still Constitutional. And as long as we have the Constitution I think we ought to stay old-fashioned.

The Court: All right. Mr. Soares?

Mr. Soares: I fail to see the distinction that counsel tried to draw between a private right and a public right. The rights are all private. Anything that is reserved to the government the Constitution provides for specifically. And every time they invade the ordinary rights of the private citizen, they are required to get an amendment to the Constitution. Now, there is a private right of all persons who care to drink to do so, but when at a certain period in our history it was felt that drinking was harmful, then they deprived the public of that private right by the Eighteenth Amendment, and so on down. So there is no distinction to be drawn. When we begin to set up the right of an individual as against the right of the public, as counsel is calling it, then you have laid the foundation for Fascism. And you simply can't guarantee a pure democracy unless you put the individual right paramount to everything else.

Now, with reference to this speedy trial being relative and not absolute, if the Court please, I take the position that the right to a speedy trial is absolute. What constitutes speed is relevant. In other words, on this one set of circumstances a trial held on a certain date will still satisfy the requirements of a speedy trial. But that doesn't [24] make the

right relevant. It merely makes the term "speedy trial" relative to other surrounding circumstances. And we must not be misled by counsel's reference to unreasonable delay. Perhaps under the language of the Constitution as to a speedy trial, the reasonableness or unreasonableness of the delay enters into it. It is only in effect the speed with which a given case is tried and reasons for it. Now, there isn't a reason in the world why this indictment could not have gone in the files of this court in the regular manner. Not one. And counsel's effort to give or get that was unsuccessful because it is admitted that the only reason was his fear, and it doesn't sound well in the mouth of the United States District Attorney to indicate that the government was afraid that it might be accused of creating an unfavorable climate. To somebody whom they knew better than anyone else wasn't entitled to any other consideration——

The Court: Oh, wait a minute, wait a minute. We are getting that old fundamental principle that you insist rightly to be given to every jury, namely, the presumption of innocence.

Mr. Soares: Sure, I don't recede from that. I have argued it too often to attempt to recede from it. What I say is that these people were not entitled to any concession. And that is all that has happened here. They have been given a concession that a man whom they claim no connection with at [25] all would not know of his indictment merely because the government feared that that might create an unfavorable atmosphere. It is a sad commentary on

the jury, if nothing else, if the Court please, that the jury would have been influenced.

The Court: Oh, I have heard you and Mr. Landau say that, yes, they heard the judge say not to read the papers and I do. And one day I challanged the accuracy of the statement Mr. Landau made in your presence.

Mr. Soares: That was one of the few times we were found to have been wrong.

The Court: Weren't you here one day when a juror said he read the paper?

Mr. Soares: He had read it, but not that he had been influenced.

The Court: But I fired him just the same.

Mr. Soares: But that was in that particular case. Your Honor didn't excuse him from serving on all future juries because, forsooth, some future defendant might say or some defendant who had been indicted might say that man should go off the panel because he has indicated that he ignored the orders of the Court and did read a newspaper.

The Court: Well, supposing, it having been indicated by the government's counsel that Judge Wiig directed that this matter be presented to the Grand Jury and if an indictment be found that it be put on the secret file, supposing that wasn't [26] done? I can tell you that as a fact.

Mr. Soares: All the record shows is—I think it is the Clerk's minutes and that is all that I had available—that Judge Wiig dismissed the indictment and referred the matter——

The Court: No, dismissed the Order to Show Cause.

Mr. Soares: I am sorry. Dismissed the Order to Show Cause and referred the matter to the District Attorney. Now, we might be getting——

The Court: Wait a minute. I will tell you that as a fact. But that is quite apart from what I was getting at. Suppose, however, that were not the fact, and the man had been indicted during the course of the Smith Act trial and the jurors were very mindful of Judge Wiig's admonition not to read the newspapers about the trial, that they were engaged in, which would not have covered any other trial, and supposing that they heeded that and didn't read the newspaper or listen to the radio, but going on from day to day they rode the bus, and anyone of them, and the fellow in front had a newspaper with a big headline on it that somebody had charged such as your client or suppose the bus stopped in front of a radio store and it was the time when the radio was blasting out the evening news or the morning news, the information that one who was once a fellow juror had been excused because somebody was charged with doing thus and so with respect to him, and it [27] would have reached Judge Wiig's jury, and whether it did or not affect them would be speculative, was not in that instance the thing to do in the interests of public justice in a fair trial to the people who were on trial to abide the day when in a calm atmosphere your client could also have his fair trial?

Mr. Soares: But all that could have been procured without violating the Constitution. There was no need for an immediate presentation.

The Court: Wait a minute. That is what you say. But how do you discount the public interests in preventing evidence from disappearing or being diluted or being lost.

Mr. Soares: We have the arm of the government that is long enough to reach prospective witnesses and require their appearance.

The Court: Did you ever hear of people changing their stories?

Mr. Soares: Certainly, if the Court please.

The Court: Do you think the government has an interest in preserving testimony?

Mr. Soares: But are we to assume that everybody is going to do wrong?

The Court: No, but we have a right to assume, do we not, Mr. Soares, that in the public interest the government will proceed fearlessly, but with due respect to the rights of individuals under the law, those on trial and those to be [28] brought to trial.

Mr. Soares: We get to this conflict again.

The Court: Well, when we get right back to the proposition that you stand on, that the right is an absolute right—I am going to tell you something. You have heard people to whom you have referred talk long and loud, as you say, about certain Constitutional rights being absolute that you perhaps have become imbued with a little bit of their philosophy without knowing it.

Mr. Soares: Well, I will deny that, if the Court please.

The Court: But that again is one of the difficulties of the day, that sometimes good lawyers of necessity or for other reasons, imitate those who should not be imitated. So I think that without knowing it you are adopting a kind of argument here that is a type that you have generally castigated in the course of your arguments.

Mr. Soares: What I am doing here is advocating the recognition of the language which is clear and unequivocal, related to this particular type of thing, that a person shall not be deprived of his right to a speedy trial. Now, perhaps some of the things that your Honor has in mind in this great fanfare about "I stand on my Constitutional rights"——not to answer the question which has been——

The Court: You take any one of them. You take any [29] one that happens to be applicable at the moment. That is the most popular one today. Go ahead with your illustration.

Mr. Soares: But that right as against self-incrimination in a criminal prosecution.

The Court: That's right.

Mr. Soares: And I don't hesitate to say that, contrary to your Honor's thought of the possibility of my being influenced, I don't hesitate to say that the government has not properly protected itself against that type of thing because if, as for instance, in a Congressional hearing, a witness is asked, are you a Communist, and he says that I stand on my Constitutional rights, which he doesn't have, because the Constitution doesn't say that in any place other than a criminal prosecution, he need not incriminate

himself, but why doesn't the government follow it up and say, are you an anti-Communist? He certainly couldn't call any privilege there because certainly nobody could be in jeopardy or endanger himself of incrimination by saying that he is anti-Communist.

The Court: Supposing he was a Russian?

Mr. Soares: Supposing he was? I am talking about the question being put——

The Court: To a Russian?

Mr. Soares: Yes, to a Russian.

The Court: Who is going back to Russia? [30]

Mr. Soares: All right. The United States doesn't guarantee the persons within its borders anything except protection within its borders.

The Court: That's right.

Mr. Soares: In the constitution. So there is no need to talk about what would happen to a Russian. Whatever happened wouldn't be enough, but the point remains that we do have this situation and it is getting worse and worse all the time.

The Court: Well, let me also say, since we are going a little bit afield, that there is pending presently in the Congress, introduced by four senators, a bill which, if passed, is to the effect that when a witness in a prosecution in a court declines to answer on the ground of self-incrimination will compel that person to answer if the Attorney General writes a letter to the court saying that public necessity requires the witness to answer. There has also been passed by the senate a bill of like nature to the effect of the Attorney General requiring wit-

nesses to answer in Congressional hearings. So that perhaps some progress is being made legally along that line that you advert to. However, you would be interested to know that at the conference in San Francisco last week the Ninth Circuit Conference was not in accord as to the merits of that bill and referred the matter to a committee to thresh out what its position should be because of a fear that a bill [31] of that nature would put too much power in the hands of the Attorney General, and secondly would enable a person who gets such immunity, to use a common phrase, to have a field day in ratting on his former friends. And that an ex-communist's testimony is at best viewed with suspicion unless corroborated by other evidence. The law should be at least so drafted as to provide that in that event it require that such testimony be corroborated. So that even among judges and legislators it is not a common view about this serious problem to which you advert. Now, that is a digression for such as it is worth.

Mr. Soares: Then I will pass on to the only remaining point, to reply to Mr. Barlow, if the Court please, and that is with reference to the third ground of the motion. Mr. Barlow has represented to your Honor that the indictment is in the language of the statutes, wherein it refers—and I am chided for overlooking the provision for corrupting, and so forth, rather than by threats—but the fact remains that the word "corrupt" as used here is only with relation to the actions not towards Peneku, the juror, and not with reference to the commission of the crime. All they say here—and that is one of the

reasons why we are complaining—is that it does not describe an offense against the laws of the United States. They do not say that in the language of the statute. You see where it refers to making an obstruction of due administration of justice, the language of the statute—corruptly or by [32] threats or by force or by any threatening communications, influences—and they don't say that he corrupts or by threats or by force, and so on, impeded the administration of justice. The only time they have used the word "corruptly" is in connection with his endeavor to influence Peneku.

The Court: In violation of the statute.

Mr. Soares: Pardon?

The Court: In violation of the statute.

Mr. Soares: It isn't the corruption of Peneku that they claim is a violation of the statute. It is the impeding of, the obstructing of justice that they claim. So whatever means he may have used in his relations to Peneku, he must still come within the language of the statute, and there is no allegation here that he does so. And counsel says the reference to the case on trial is sufficiently made in the indictment. I submit not. All that that case does is to describe the person, the juror, in a certain case. But not the obstruction of justice was attempted in that case.

The Court: The motion to dismiss this indictment on each of the three grounds alleged is denied. There is no double jeopardy. The action of the Court in that case was a disciplinary action and was not an indictment action and not a criminal offense

and the two are not synonymous but are different. They are different in their very nature. (O'Malley vs. United States, 128 Fed. (2d) 676. The [33] indictment, on consideration of the third ground of the motion, is sufficient. It clearly, plainly, and simply in the words of the statute, advises the defendant of the nature of the charge in an adequate manner, enables him to prepare his defense with regard thereto and protects him against double jeopardy.

Finally, as to the stressed second ground, the alleged right to a speedy trial, it is, of course, a constitutional right, but it is not an absolute right. Under the circumstances surrounding the seven and one-half months' Smith Act trial recently concluded, in this court, presided over by Judge Wiig, and entitled United States vs. Fujimoto, Criminal No. 10,495, wherein the person mentioned in this indictment, Peneku, however you pronounce his name, was one of the jurors, he was discharged for reasons that have been referred to and which appeared to form the basis of this indictment; and in the light of the First Circuit recent decision in the Delaney case, I am well satisfied in point of law that not only is this right to a speedy trial not an absolute right but is one which must be balanced in the judgment of the court and in the judgment of the prosecuting branch of our government, with reference to the best interests of public justice and the individual constitutional rights of other defendants, particularly those then on trial in the same identical court, especially where a case such as this grows out of a trial then in progress. [34]

Accordingly, as announced, the motion on each of the grounds alleged is denied.

Mr. Soares: At this time may we present a motion for a bill of particulars?

The Court: You may.

(Mr. Soares hands a document to the clerk.)

The Court: And set it down for argument five days hence, which is the standard time allowed, unless the parties wish to advance it.

Mr. Barlow: Unless the parties wish to advance it to an earlier day? We can hear it right now, if your Honor is free and willing.

The Court: I am free and willing, but I find that it would be better to have a little more time, to be a little more careful and take a little time and examine the matter dispassionately and with the aid and assistance of law clerks.

Mr. Soares: Five days from today would be Monday, the 20th?

The Clerk: Wednesday.

The Court: I will handle it earlier if you are ready.

Mr. Soares: Well, I would be ready at any time.

The Court: All right. How about Monday?

The Clerk: Monday at 9 o'clock, your Honor?

Mr. Soares: It is a little bit confusing. The [35] Court said five days. You said you would be ready at any time. I didn't get through saying what I was going to say. I have a jury trial in a criminal case which will be finished tomorrow and the next day, and I go into a civil trial on Monday which is now set for 9 o'clock. But if your Honor would fix an afternoon hour——

The Court: All right.

Mr. Soares: I am sure I can get the Circuit Court—in fact, I believe I have been told there will be no afternoon sessions.

The Court: Monday afternoon, then, at 2 o'clock.

Mr. Soares: All right.

The Clerk: You have a motion in a case at 2 o'clock.

The Court: Well, then, put this down for 1:30.

Mr. Barlow: I may state in open court, your Honor, that the government is willing to furnish Mr. Soares with No. 2.

The Court: Well, your reference to No. 2 indicates that there is a No. 1 that he might like to be heard on. All right. The Court will stand adjourned for the day.

(The Court adjourned at 4:20 p.m.) [36]

July 20, 1953

The Clerk: Criminal No. 10,704, United States of America vs. Stephen Kong, Jr., for hearing on motion for bill of particulars.

The Court: Are the parties ready?

Mr. Soares: First may I offer my apologies. I confused the name Kong with the name Chang which is a Circuit Court matter. I am perfectly willing to submit the motion on the motion, itself, if the Court please. I think from our point of view it should be apparent that we need the information. There is no special reason except that it seems apparent that it could be properly given without

jeopardizing the prosecution's case, and still assist the defendant to prepare the defense.

The Court: As to your being late for court, those things happen in the best of regulated families. I accept your apology.

With regard to your motion, I think, as you say, we might just as well strip it of all its fancy words and get down to the gist of it. Heretofore the government has said that it would give you the matter asked for in point No. 2. However, I daresay you would not be too surprised when you get to the answer to that because I can almost guess it. Nos. 1 and 3 are somewhat similar and very frankly the only [1*] matter that I wish to have attention addressed to is with respect to the request for the manner and method by which it is alleged in the indictment that the defendant sought to influence and intimidate Samson N. Peneku.

Mr. Barlow, what have you to say?

Mr. Barlow: I think Mr. Soares is asking for the government's case in both No. 1 and No. 3.

Insofar as the time and place is concerned——

The Court: I have already indicated that I don't want any argument about that. I am not requiring you to give time and place, but I am only concerned about manner and method of alleged violation.

Mr. Barlow: The manner and method, I respectfully submit, is evidence and I don't think any bill of particulars requires the government to give any of its evidence that it has lined up for any particular case.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: That is elementary, but how is this man going to prepare his defense unless he knows the nature of the charge as to both manner and method by which it is claimed that he violated the statute.

For example, there is a case my law clerk showed to me this morning where in a motion for the bill of particulars was denied. Nevertheless the indictment said that the method—or whatever the adjective was that they used—was an offer to pay the juror $200. There you know that the method [2] is by financial operation.

Now, certainly the allegation as to the $200 feature in this case to which I have made reference, which is Bedell vs. United States, 78 Fed. (2d) 358, does acquaint the accused with the knowledge that the alleged charge related to a certain sum of money. Isn't the defendant here similarly entitled to know whether the charge relates to a method of that sort resorted to to intimidate a juror, or whether it was by threats of physical violence, or both, etc., without spelling out the detailed evidence.

Mr. Barlow: I feel that in view of the investigation that if we spell out exactly how the offense was committed that we are giving the defendant the evidence that we have in the case.

The Court: Well, I know that the government always takes that position and hides behind the operation. The government never likes to have a bill of particulars ordered, because it is contrary to its wishes, and if it had desired to let the defendant know, it would have put that particular in the indictment.

Bills of particular are wrung out of the government by force, so I am not surprised at your approach to the matter by saying it cannot be done because it would reveal evidence, but that is a mere statement. It does not prove anything. It is a general covering up operation. I again ask you why you [3] couldn't tell them the general manner and general method without revealing the evidence.

Mr. Barlow: I think the defendant knows precisely and exactly——

The Court: The question is whether from this indictment, based on what it charges, the defendant can clearly without ambiguity prepare his defense.

Mr. Barlow: The indictment says by corruptly approaching and attempting to influence Peneku.

The Court: How?

Mr. Barlow: Well, the indictment alleges he endeavored to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence, intimidate and impede the said Peneku.

The Court: Well, those are all conclusions in the words of the statute. They may be sufficient to satisfy the requirement, but in this day of short-form indictments and with liberality being the key with respect to bills of particulars, I again ask you as to the wording you have just quoted from the indictment, how is he supposed to have done these things?

Mr. Barlow: All I can say is he knows how he did it.

The Court: That isn't the question. You are [4] assuming again, a fact not in evidence. He is pre-

sumed to be innocent. I don't know that he knows a thing. The question is whether he can be advised by the government as to the nature of the charge and given some particulars to clearly and specifically prepare the defense.

Mr. Barlow: All I can say to the Court is that if we give Mr. Kong what the Court is asking for here then we will give Mr. Kong our entire case.

The Court: Well, that still leaves me up in the air with a lot of generalities and a lot of words and nothing to put my finger on. I strongly suggest to you that the man is entitled to know generally the manner and method that the government charges he resorted to for the purpose of accomplishing the thing charged. It is no answer to say, "Oh, well, he knows. He did it." You are dealing with a man presumed innocent.

Mr. Barlow: As I said, the function of a bill of particulars—in the first place, the demands rest with the sound discretion of the Court.

The Court: Right.

Mr. Barlow: Secondly, the defendant, is being given any information that he asked for in a demand for a bill of particulars, is given that particular so that at no future trial is he again put in jeopardy. Then he is in a position where he can plead a former acquittal or former [5] conviction. As a matter of right, he is not entitled to the bill of particulars so long as he knows, generally, with what he is charged.

In order for him to properly prepare a defense, he is being charged with the obstruction of justice.

He is being charged with impeding justice and he is being charged with approaching Mr. Peneku on a certain date. For the government to give them anything, the government, if necessary, will just have to give all the evidence that the government has.

The Court: Supposing that was the practical effect and result. What is so injurious about that?

Mr. Barlow: If your Honor feels he is entitled to it——

The Court: The question is what is so injurious about letting the defendant know what the evidence is? If it is good evidence, it is going to be good today, tomorrow and the next day. If it is no good, you might as well know now.

Mr. Barlow: If the defendant knows what the government's case is, it will give him ample opportunity to either set up an alibi, approach some of the witnesses that have been interviewed——

The Court: Then you might have two cases instead of one. [6]

Mr. Barlow: Yes, but we will never get it done, if we are building cases. We want to get done with this case.

The Court: The law will never end until the world ends. You and I may change, but the law doesn't.

Mr. Barlow: We *can around* all afternoon. All I can say is if I give him the information *he asking* for, I am giving all the information I have and he can put on my case when the trial is held because he will have all the evidence.

The Court: Your argument about exceeding the area with the possibility of an alibi relates more

properly to time and place. Certainly, in the event, he knows enough as to time and place as the indictment states that "on or about November 8, 1952, in the City and County of Honolulu."

Now, if in order to tell him, generally—not specifically, but generally—the manner and method by which the influencing and intimidating and impeding is charged in the indictment was accomplished, it is necessary, in the government's opinion, to reveal some evidence, there is nothing terribly wrong about that. You reveal evidence in the indictment when you say "on or about November 8, 1952, in the City and County of Honolulu," and it is sometimes necessary in the interest of justice to reveal certain amounts of evidence to enable the man charged to know what he is charged, to at least know what he is charged with and to be able to prepare an adequate defense in order to protect himself [7] against double jeopardy.

If, as a result of the revealing of certain particulars, further complications arise whereby you get additional charges growing out of a pending case, so much for that. The law will take care of those situations as they arise.

Mr. Barlow: It is rather difficult to catch up to those things.

The Court: I know, but that is no answer when you have a government as large and as efficient as ours. I will grant that your particular office is presently hard pressed for personnel in relation to matters that you have to consider, but I must look at the matter from the standpoint of the government as a whole and the defense of justice as a whole.

I am going to grant the motion for the Bill of Particulars in the following regard:

As to No. 2, the government having offered to give that information to the defense, I will order it given.

No. 1 and No. 3 I grant only in part in that I direct that the government give to the defendant a general description of the manner and/or method, or both, by which it is charged he sought, in the words of the indictment, to influence, intimidate and impede Juror Peneku in the discharge of his duties. This refers to United States vs. Charles Fujimoto, et al., Criminal No. 10,495. I call attention to the fact that I said "generally" and not specifically. [8] I do not compel you to give evidence unless the giving of it is necessary in order to meet my direction that you "generally" acquaint him with the alleged method or manner.

Mr. Soares: Will the Court please set a time?

The Court: Yes, five days. And the matter may be set down for plea and setting.

What day is today?

The Clerk: Today is the 20th.

The Court: Well, I will direct that the five days be shortened to four days, and that the Bill of Particulars be complied with as directed by the Court on or about Friday of this week at 4:00 o'clock, and that the matter be set for plea and setting on the 29th. At what hour, Mr. Clerk?

The Clerk: At 9:00 o'clock.

The Court: Very well.

The Clerk: We have a plea at 2:00 o'clock.

The Court: All right, at 2:00 o'clock. [9]

Mr. Soares: Yes.

The Court: All right. Is that agreeable?

August 14, 1953

(Following recess after impaneling of the jury.)

The Court: Note the presence of the jury and the defendant, together with counsel. At this time the government may make an opening statement, if it desires.

Mr. Soares: May I make the motion regarding witnesses being removed from the room? I realize it has never been passed upon. I want to avoid, at least, responsibility on the part of defense counsel to make the motion, namely, that the witnesses be excluded from the courtroom except when actually giving testimony in the court; otherwise, that the witnesses be placed under the rule.

The Court: For reasons heretofore assigned in other cases, with which you are familiar, the request is denied. We had a witness at one time decide to tell the truth because there were witnesses in the courtroom.

Very well. The government may at this time make its opening statement.

Opening Statement

Mr. Richardson: If your Honor please, and ladies and gentlemen of the jury: The facts here are very, very simple, and the proof will be very short. We will prove that during the recent Smith Act case, which was tried in Judge [1*] Wiig's court, one of the jurors originally impaneled upon

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

the jury panel was a man named Samson Peneku. The jury was sworn during the early part of November and then released to come back the following week to start the actual trial.

On a Saturday night during the interval after the swearing of the jury and the time when the case was to start Mr. Peneku at his home was approached by the defendant Stephen Kong. Mr. Kong came to Mr. Peneku's house with Mrs. Peneku's niece, with whom he was keeping company at that time. On that Saturday night there were several people in the room and Mr. Kong asked Mr. Peneku if he could speak with him privately. They left the room and Mr. Kong and Mr. Peneku went back to another room and at that time, in brief, Mr. Kong asked Mr. Peneku if he would do him a favor.

Mr. Peneku said, "What is it?"

And Mr. Kong said, "I want you to vote 'not guilty'."

Mr. Peneku became angry at this and they left the room and went out with the other people and shortly after that Mr. Kong left. There was some other conversation, but, in brief, that is what the case is.

Mr. Soares: We will reserve our opening statement.

The Court: Very well. The government may call its first witness.

Mr. Richardson: We will call Mr. Peneku. [2]

SAMSON N. PENEKU

a witness called by and on behalf of the plaintiff, having been duly sworn, testified as follows:

The Court: Will you please state your name?

The Witness: My name is Samson N. Peneku.

The Court: Speak good and loud so that everyone can hear every word you say. How old are you?

The Witness: Sixty-three.

The Court: Where do you live?

The Witness: 1128 Gulick Avenue.

The Court: What is your occupation?

The Witness: I am a welder for the Honolulu Gas Company located at the relay plant.

The Court: Are you a citizen of the United States?

The Witness: Yes, I am a citizen of the United States.

The Court: Only?

The Witness: Yes, sir.

The Court: Take the witness.

Direct Examination

By Mr. Richardson:

Q. Were you selected as a juror in the recent case tried in Judge Wiig's court, which is known as the Smith Act case? A. Yes.

Q. Do you recall what day of the week it was that the jury [3] sworn?

A. It was sworn on the 5th.

Q. Of what month?

A. The 5th of November, 1952.

Q. Now, Mr. Peneku, you were on the panel when it was sworn, is that correct? A. Yes.

(Testimony of Samson N. Peneku.)

Q. Now, Mr. Peneku, when was the trial actually to start, if you know?

The Court: What trial?

Mr. Richardson: The Smith Act trial.

The Court: Does the case have a name and number?

Mr. Richardson: Yes, sir, the case of United States of America vs. Charles Kazuyuki Fujimoto, and others, Criminal No. 10,495.

Q. (By Mr. Richardson): When was the trial actually to start, if you know, the taking of the proof and the starting of the trial?

A. Well, the jury was sworn in and it was approved on the 5th of November, 1952, in Judge Wiig's office.

Q. And you were on that jury?

A. I was on that jury.

Q. Do you know when the proof was actually to start? When was it you were told to come back to start the case? A. Yes, we were. [4]

Q. What date was that?

A. That was on the 6th. That was the date after I was sworn.

Q. No, I mean the actual taking of the proof.

A. Well, the actual taking was on November 12th.

Q. Was there a week end between the date you were sworn and you were supposed to return?

A. There was a week end and there was a holiday.

Q. There was a week end between the day you

(Testimony of Samson N. Peneku.)

were to be sworn and the date proof was to be taken? A. Yes.

Q. Do you know the defendant in this case, Stephen Kong? A. No, sir.

Q. What I mean is, have you ever seen him and talked to Mr. Kong? A. No.

Q. You have talked to him, have you not?

A. No, I haven't.

Q. Do you know this gentleman sitting at the table?

A. Not until that night he approached my place.

Q. Have you ever seen him before?

The Court: He means before today.

The Witness: Well, just on the night he approached my place.

Q. (By Mr. Richardson): You have seen this gentleman before? [5] A. Yes, sir.

Q. Did Stephen Kong come to your house during the week end between the dates that the jury was sworn and the time the trial started?

Mr. Soares: May I object to the question as leading?

The Court: The objection is sustained.

Q. (By Mr. Richardson): Has he ever been to your house?

A. Really, I don't know. I have not seen him be at my house while I am at home.

Q. Has he ever been at your house?

A. Possibly so, I don't know.

Mr. Soares: I would like the Court to take note of the actions of the lady in the front row express-

(Testimony of Samson N. Peneku.)

ing something, showing some emotion over the manner in which the witness is answering. I assume it is Mrs. Peneku, a proposed witness in this case.

The Court: Well, unless there is some communication between a spectator and a witness——

Mr. Soares: She is communicating by means of motions. She has been doing it each time that counsel has been having difficulty in getting the witness to understand just what he wanted in answer to his question. I think it is improper.

The Court: If that is happening, it is. [6]

Mr. Soares: I simply ask the Court to instruct the spectators to observe the witness rather than make objection.

The Court: I will caution everyone in the courtroom to in no way react by signs or motion to anything that is said by a witness. You may proceed.

Q. (By Mr. Richardson): Mr. Peneku, on a Saturday night early in November, did Mr. Kong come to your house? A. Yes, sir.

Q. Who was with him, if you know?

A. Mrs. Minnie Gohier.

Q. Who is Mrs. Minnie Gohier—I will ask you this: Is she related to your wife?

A. Yes, sir.

Q. What is the relationship? A. Niece.

Q. Mr. Peneku, who was present at your house when Mr. Kong came?

A. Well, there was my daughter-in-law and my father-in-law.

(Testimony of Samson N. Peneku.)

Q. What is your daughter-in-law's name?

A. Anita Peneku.

Q. And you said your father-in-law?

A. My father-in-law, Lawrence Maioho.

Q. And he was there? A. Yes.

Q. Was Mrs. Peneku there? [7]

A. Yes, she was present.

Q. Do you recall what day of the week that was?

A. That was on a Saturday night.

Q. Do you know if that was the Saturday after you had been sworn in as a juror?

A. Yes, sir.

Q. It was? A. Yes, sir.

Q. Now, Mr. Peneku, what were the people in the house doing? Were they sitting there talking?

A. We had a few bottles of beer with the exception of my Mrs. and I.

Q. You had a few beers? A. Yes.

Q. Who brought the beer to the house?

A. Mrs. Gohier.

Q. Did you see Mr. Kong? A. Yes.

Q. What were you doing?

A. I was lying down on the punee.

Q. Were you reading? A. Yes, sir.

Q. What were the rest of them doing?

A. They were sitting around the table and talking.

Q. After the conversation, did Mr. Kong come to you and say [8] anything?

A. I didn't understand you.

Q. Did Mr. Kong, the defendant here, come over

(Testimony of Samson N. Peneku.)

to you while you were on the couch reading and say anything to you? A. Yes.

Q. What did he say?

A. He said, "Hey, you, I want to talk to you."

Q. Did he say anything else?

A. No, that was all.

Q. What did you say?

A. I hesitated for a while and I looked at him and finally I stood up and went with him.

Q. Where did you go?

A. We went to my father-in-law's room.

Q. Was anyone else in the room?

A. No, sir.

Q. Did you have a conversation with Mr. Kong in the room? A. Yes, sir.

Q. Just tell us as well as you can remember, Mr. Peneku, what was said to you and what you said to him.

A. Yes, sir. Well, he said he wanted me to vote not guilty against the Smith Act because Harriet was a great friend of his.

Q. Who was a great friend of his?

A. Harriet. [9]

Q. Do you know anyone named "Harriet"?

A. At that time I didn't know who Harriet was, but after I recalled Harriet Bouslog, the lawyer. He didn't mention it, but to my opinion that is the only one I could think of, Harriet Bouslog.

Mr. Soares: I move that the opinion be stricken and the jury instructed to disregard it.

(Testimony of Samson N. Peneku.)

The Court: Yes. His opinion as to what the speaker who used the name "Harriet" meant may go out. We are only interested in what he understood himself.

Q. (By Mr. Richardson): What was it that was said about Harriet?

A. That Harriet was a great friend of his, that she was going to take up his case on Maui for his mother.

Q. And you stated he asked you to vote not guilty? A. Yes, sir.

Q. What did you understand him to mean by that?

Mr. Soares: We object to the witness' understanding, and ask that the jury draw its own conclusions as to the proper understanding to be drawn from those remarks.

Mr. Richardson: This is the witness' understanding that I am asking for.

The Court: The witness may answer.

Q. (By Mr. Richardson): What did you understand him to mean when he asked you—— [10]

The Court: No.

Mr. Richardson: I phrased it wrong. What did I ask you?

The Court: In any situation like that I will not let a witness testify as to what he thinks the speaker meant, but I will let the witness testify as to what he understood was meant by the words used.

Mr. Soares: We object to that situation for the same reason.

(Testimony of Samson N. Peneku.)

The Court: Very well.

Mr. Richardson: May I proceed?

The Court: Make sure the witness understands the question.

Q. (By Mr. Richardson): What was your understanding of Mr. Kong's statement to you?

A. Well, he said that Harriet was a good friend of his; that she was going to handle his mother's case on Maui.

Mr. Soares: I can't hear the last words. The witness dropped his voice.

The Court: Speak up.

The Witness: And that Harriet was going to defend his mother on Maui.

Q. (By Mr. Richardson): What was your understanding of what he said about voting not guilty?

Mr. Soares: We object to that, if the Court please. [11] He can't usurp the functions of the jury. The jury is given the facts and they will determine whether or not this man acted corruptly. He can't set up an opinion for them by stating, "As for me, I understood thus and so."

The Court: The witness may testify, as I have already ruled, as to what he understood the speaker to mean, so far as the witness is concerned.

Q. (By Mr. Richardson): The question is what was your understanding of what Mr. Kong said to you?

A. That is what he said, that Harriet was a good friend of his; that she was going to take up the case of his mother.

(Testimony of Samson N. Peneku.)

Q. You said he asked you to vote not guilty?

A. Yes, sir.

Q. What was your understanding of that with reference to what he said, with reference to voting not guilty?

A. He told me to vote not guilty. I said, "No, no, I can't do that."

Q. What did you understand the words, "not guilty" meant? Vote not guilty in what way?

Mr. Soares: We urge the same objection, if the Court please. Let him tell the whole conversation.

The Court: It is the same objection, but I think what you mean is that the question is leading. That objection would be good.

Mr. Richardson: This is a difficult witness. [12] If I could have a little latitude—I am not trying to testify for him.

The Court: I agree that he is slightly difficult, but it would be much better, under the circumstances, if you would exhause the possibility of telling what happened completely and clearly.

Q. (By Mr. Richardson): Was that everything that was said back there in the room between you and Mr. Kong? Was anything else said?

A. I don't remember anything else that was said, but there was one understanding in my mind in regard to vote "not guilty" and I took it for the Smith Act case.

Q. That was your understanding?

A. Yes, that was my understanding.

Q. How did you feel about what he said to you?

(Testimony of Samson N. Peneku.)

A. I didn't tell——

Mr. Soares: Objected to as being incompetent, irrelevant and immaterial, the witness' reaction, a personal feeling in the matter.

The Court: The objection is sustained.

Q. (By Mr. Richardson): Did you have any reaction to what he said, Mr. Peneku?

A. Well——

Mr. Soares: If you can't testify to what his reaction was, whether he had one or not becomes immaterial. [13] We object to the question on that ground, in view of the Court's last ruling.

The Court: No, this is a different question. A reaction to what he said might be additional words. I don't know. However, don't by this question be seeking to circumvent my prior ruling.

Mr. Richardson: No, I am asking his reaction to it.

Q. (By Mr. Richardson) What was your reaction to what he said?

A. I got mad right off the bat and I opened the door and I said, "Get out."

Q. Did he leave?

A. I told him to get out. He went ahead and I closed the door. He walked out to the kitchen. They sat there a little while and scrammed.

Q. What was the last?

A. They sat down a little while and then scrammed, left the house.

Q. Whom do you mean by "they"?

A. Mrs. Gohier and Kong.

(Testimony of Samson N. Peneku.)

Q. The following week did you go to see Judge Wiig? A. Yes, sir.

Q. Did you report to him what happened?

A. Yes, I did. [14]

Mr. Soares: I would like to have an opportunity to object before the witness answers. I ask that the answer be stricken and we object to this as being irrelevant and immaterial, what he did after that.

The Court: What is the relevancy?

Mr. Richardson: I want to show that he did report the incident.

The Court: You may go up to that point.

Q. (By Mr. Richardson): Did you report that to Judge Wiig? A. Yes, I did.

Mr. Soares: It is still irrelevant and immaterial and it has nothing to do with the case.

The Court: I have already ruled that he can cover it up to this point.

Mr. Soares: Now he will want to say what he did tell Judge Wiig.

The Court: No. Please listen to the question.

Q. (By Mr. Richardson): Mr. Peneku, your house is on Gulick Street? A. Yes.

Q. That is on the island of Oahu, in the City and County of Honolulu, is it not? A. Yes, sir.

Mr. Richardson: That is all. [15]

Cross-Examination

By Mr. Soares:

Q. When you reported to Judge Wiig was what you said taken down by a reporter?

A. I don't know.

(Testimony of Samson N. Peneku.)

Q. Was there anybody else present when you reported to Judge Wiig?

A. No, just the Judge and I.

Q. You testified that Mr. and Mrs. Gohier left your house. Do you mean by that that nobody left with them? A. No.

The Court: Just a moment. You said Mr. and Mrs. Gohier. I had not heard about Mr. Gohier.

Mr. Soares: I meant Mr. Kong and Mrs. Gohier.

The Court: Let's get the spelling of that name.

Mr. Soares: G-o-h-i-e-r, I believe.

Q. (By Mr. Soares): Did anybody else leave with them? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. Does Mrs. Gohier have some children?

A. Yes, sir.

Q. Did they sometimes come to your house?

A. They do often come to my house.

Q. Were they there on the Saturday we are talking about? [16]

A. They come weekends and sometimes during the holidays.

Q. This particular Saturday were those children there? A. Yes.

Q. Do you know when they came to your house?

A. I don't know just when.

Q. Had they been at your house more than one day?

A. Well, they come there and go out and come back and go out.

(Testimony of Samson N. Peneku.)

Q. I am talking about this particular occasion, Saturday, the 5th of November, I think you said it was. Did they come into your house that day or had they come to your house and stayed?

A. They came before and stayed.

Q. How long had they been there up to Saturday?

A. A day or two; sometimes overnight.

Q. I am talking about this particular time.

A. I don't know how long.

Q. More than one day? A. I don't know.

Q. How long did they stay on that occasion altogether? A. Do you mean the children?

Q. Yes. A. They slept overnight.

Q. What night did they sleep there?

A. The night he approached me. [17]

Q. That is Saturday night?

A. That was Saturday night.

Q. Had they slept there Friday night?

A. No, sir, Saturday night.

Q. Did I understand you to say you had never seen Mr. Kong at your house before that day?

A. No, sir.

Q. Had you ever heard about him?

A. Yes, sir, I heard about him.

Q. You heard about him as a man who was keeping company with your wife's niece?

A. No, sir.

Q. When did you first hear about Mr. Kong?

A. Well, I couldn't tell you when.

Q. About how long ago?

(Testimony of Samson N. Peneku.)

A. Oh, sometime before this case came up.

Q. Well, about how long before November 5?

A. I don't know about how long.

Q. Can't you give us any idea?

A. I say I don't know how long.

Q. Can't you give us any idea? A. No.

Q. Did you know that he was keeping company with your wife's niece?

A. I don't know nothing about their affairs. [18]

Q. Had you ever heard about it?

A. I had heard that he was going with her, but I don't——

Q. You didn't like it? A. You bet I don't.

Q. What is that? A. You bet I don't.

Q. You don't like Mr. Kong very much?

A. Because I don't like him.

Q. You didn't like it because he was keeping company with your wife's niece?

A. He is, but I am not saying nothing.

Q. You said you bet you didn't like the idea and my next question is because you didn't like the idea you didn't like him?

A. No, no, sir. I didn't say so. Just because I didn't know, that is the reason.

Q. And you had never seen him in that house before? A. No, sir.

Q. When he came there on Saturday the 5th, were you already home?

A. Yes, I was in my pajamas.

Q. About what time did he arrive?

A. It was up to sunset.

Q. What is it?

(Testimony of Samson N. Peneku.)

A. Up to sunset in the evening. [19]

Mr. Soares: I didn't get the answer. Will the reporter please read the answer.

(The answer was read.)

Q. (By Mr. Soares): Oh, after sunset. And you were lying in your pajamas reading?

A. Yes, sir.

Q. What were you reading?

A. Life magazine.

Q. And in what room were you lying?

A. We were all in the kitchen.

Q. On what were you lying?

A. On the punee.

Q. Was anybody else lying on the punee with you? A. No, sir.

Q. And where was Kong when you first saw him? A. He was sitting around the table.

Q. Who else was sitting around the table, if anyone?

A. There was my daughter-in-law, my father-in-law and Mrs. Gohier and my wife.

Q. You had not seen Kong until you saw him sitting around the table?

A. No, I saw him that night when he came into the house.

Q. I beg your pardon?

A. I saw him that night when he came to the house.

Q. Where did you first see him? [20]

A. In the house.

Q. What part of the house?

(Testimony of Samson N. Peneku.)

A. Where he was sitting down on the chair.

Q. You don't know how he got to the chair?

A. When he came that night with Mrs. Gohier they brought a package with a lot of beer in it.

Q. What do you mean "a lot of beer"?

A. Well, they had beer in the package.

Q. What do you mean "a lot of beer"?

A. Well, more than two or three bottles in the package.

Q. Ice cold beer?

A. Well, I don't know. I never tried it.

Q. Well, when did you first see Mr. Kong?

A. Right at that evening my house.

Q. Where? A. In my house.

Q. What part of your house?

A. Well, I will tell you. He was in the kitchen sitting on a chair.

Q. You did not see him until you saw him sitting on the chair?

A. Well, I saw him walk in, but I wasn't introduced to him.

The Court: Go ahead.

The Witness: I didn't know who he was until he sat down on a chair and then he was introduced as Mr. Kong. [21]

Q. (By Mr. Soares): Who introduced you?

A. Mrs. Gohier.

Q. What did she say?

Mr. Richardson: I object to this as being irrelevant.

The Court: The objection is overruled.

(Testimony of Samson N. Peneku.)

The Witness: She said, "This is Steve Kong." I never said no more. I just sat down and looked at him.

Q. (By Mr. Soares): Did she say anything about him? Didn't she say this is the man I am keeping company with?

A. No, sir, she didn't say nothing.

Q. I believe you said you heard about Mr. Kong before in connection with his keeping company with your wife's niece? A. No, sir.

Q. You never heard the name "Kong"?

A. I heard the name Kong, but I never heard that kind of remarks before.

Q. In what connection did you hear the name Kong? A. In connection with——

The Court: Mr. Penekeu, will you pronounce your words a little clearer. You are running them together. Take your time and answer the question as clearly and loudly as you can.

Q. (By Mr. Soares): Who did you first hear mention the name Kong? [22]

A. I don't know who.

Q. When?

A. Well, sometime before the thing came up.

Q. How long before the case came up?

A. I don't know how long.

Q. Where were you when you first heard it?

A. Well, outside in the yard. I was playing around in the yard all day.

Q. Who mentioned his name?

A. The children.

(Testimony of Samson N. Peneku.)

Q. What did the children say?

A. Mrs. Gohier's children.

Q. What did they say?

A. "Momma was around here with Kong today." That is all.

Q. And that is the only time you heard the name "Kong" mentioned? A. Yes, sir.

Q. Now, when your wife's niece introduced Mr. Kong saying "This is Stephen Kong" did you say anything? A. No, sir. I never said a word.

Q. You were lying on the punee?

A. On the punee.

Q. Reading a Life magazine? A. Yes.

Q. Did you look up to see who it was? [23]

A. I didn't care to look up.

Q. Why didn't you?

A. Because I was not interested. I had my mind on something else.

Q. So your wife's niece introduced somebody and you paid no attention?

A. It made no difference because I never met the man before.

Q. She was trying to get you to meet him then?

A. Yes.

Q. You still weren't interested?

A. No, sir.

Q. You kept reading your paper and never took your eyes off of it? A. No, sir.

Q. Did you make any reply? A. No, sir.

Q. Did Mr. Kong say anything at that moment?

A. Well, I don't remember whether he did or not.

(Testimony of Samson N. Peneku.)

Q. You didn't say, "Pleased to meet you," or anything of that kind? A. No, sir.

Q. As a matter of fact, you were not pleased to meet him? A. I didn't say so.

Q. He didn't say, "Pleased to meet you"?

A. No, sir. [24]

Q. He didn't say anything at all?

A. No, sir.

Q. After that you didn't see Kong until he was seated at the table?

A. Well, the door was right near the table. He just came in and sat down right there. It is not any more than four feet.

Q. After you wife's niece introduced you and said, "This is Steve Kong," you didn't see him until he was seated at the table with the other people? A. Yes.

Q. That is correct? A. Yes.

Q. How long after your wife's niece presented Mr. Kong was it that you saw him seated at the table? A. I don't know how long.

Q. About how long?

Mr. Richardson: He says he doesn't know. I don't see why it is relevant enough to go over it and over it and take the time.

The Court: He may answer.

Q. (By Mr. Soares): Can you give us an idea about how long after?

A. A matter of a very short time.

Q. How come you saw him at that time? [25]

A. Because he was sitting down on the chair.

(Testimony of Samson N. Peneku.)

Because I was facing straight to the way he was sitting down.

Q. Did you put down the magazine?

A. No, sir.

Q. How were you able to see him?

A. I had my magazine up in the air, because it is a clear deal around.

Q. You took eyes off the magazine and looked over the edge of the magazine and saw Mr. Kong at the table? A. Yes, sir.

Q. Nothing occurred there to attract your attention to him, did it? A. No, sir.

Q. Up until the time that Mr. Kong came over and talked to you, had anybody in that room said anything other than when Mrs. Gohier introduced Mr. Kong?

A. In what room? In the kitchen?

Q. In the kitchen, yes.

A. All of my family was there in the kitchen.

Q. Did anybody say anything?

A. Not that I know of. I don't remember.

Q. Is it that you don't remember or if they did say something you didn't hear it? A. No.

Q. Which is it? [26] A. I didn't hear it.

Q. Then the very next thing you heard after your wife's niece introduced Mr. Kong was when Mr. Kong came up to you and spoke to you?

A. Yes, sir.

Q. And what was it that Mr. Kong said to you then? A. That he wanted to see me.

Q. What did he say?

(Testimony of Samson N. Peneku.)

A. "You, I want to see you."

Q. Just like that? A. What is it?

Q. Just like that? A. Yes.

Q. What was his tone of voice?

A. Well, it was pretty high.

Q. Was it friendly or rough?

A. Well, it was not too friendly.

Q. Was it at all friendly or rough?

A. It was friendly.

Q. What didn't you like in his tone?

A. Well, his voice was pretty high.

Q. Well, you talked to him afterwards?

A. I didn't say anything. I looked at him for a long time.

Q. After that, after he said that you went in the room and you and he had a talk? [27]

A. Yes, sir.

Q. Was it the same tone of voice in the room?

A. Yes.

Q. Could you tell whether he was angry at you?

A. I don't know.

Q. When he came up and said, "You——

A. I don't know.

The Court: Just a minute. Wait until the question is finished before you try to answer it.

Q. (By Mr. Soares): And do you remember that distinctly what he said was, "You, I want to see you"? A. Yes, sir.

Q. You pointed your finger when you were repeating the words that you say he said. Did he point his finger the same way you indicated when you said, "You, I want to see you"? A. Yes.

(Testimony of Samson N. Peneku.)

Q. You were still looking down and reading your magazine? A. Yes, sir.

Q. After Mr. Kong said, "You, I want to see you," who next spoke?

A. I don't know who spoke next.

Q. Who do you recall as speaking next after he said that?

Mr. Richardson: He says he doesn't know. I object to it. It is just the same question. It is repetitious.

Mr. Soares: I don't see that it is [28] repetitious.

The Court: I know, but if he doesn't know who, he can't recall.

Mr. Soares: I didn't ask him to recall who next talked. I asked him whom he recalled next talked, not who actually talked.

The Court: The objection is sustained.

The Witness: I don't know.

The Court: There is no question for you to answer.

Mr. Soares: Did the Court sustain the objection?

The Court: Yes.

Q. (By Mr. Soares): After Mr. Kong pointed his finger at you and said, "You, I want to see you," what was the first thing you said?

A. I never said anything.

Q. All the rest of that night?

A. Yes, sir—no, not at that moment.

Q. I am not asking about that moment, I am asking about the first thing you said after that.

(Testimony of Samson N. Peneku.)

A. I never said nothing. I stood up and walked with him.

Q. Well, didn't you say anything anymore?

A. No, I never said anything.

Q. You mean you didn't speak a word?

A. No, sir, not until we got into the room.

Q. Well, at any time, whether it was in the room or at any time, did you speak to him in the [29] room? A. Yes.

Q. What was the first thing you said to him in the room?

A. I didn't say it first. He said it first.

Q. What was the first thing you said?

A. I said, "No, no, no."

Q. And what did he say to you, if anything, after you said, "No, no, no"?

Mr. Richardson: I object to this as an attempt to confuse the witness.

The Court: Overruled. Do you understand the question?

The Witness: Yes, sir.

The Court: All right, you may answer it.

The Witness: Well, he asked me to, "I want you to vote not guilty on the Smith Act."

Q. (By Mr. Soares): That was before you said, "No, no, no?" A. Yes, sir.

Q. I am asking you what, if anything, did Kong say after you told him, "No, no, no."

A. No, sir, he didn't say nothing.

Q. Nothing more? A. No, sir.

Q. And when you said, "No, no, no," did you walk out or did Kong go out first?

(Testimony of Samson N. Peneku.)

A. I opened the door and let him go out [30] first.

Q. Now, after Kong said to you, "You, I want to see you," what was the next thing you remember Kong said to you? A. I don't remember.

Q. Do you remember him saying anything to you after that?

The Court: Mr. Soares, I am going to ask you to identify the room in the house you are talking about in your question. It is quite obvious to me——

Mr. Soares: I am cross-examining.

The Court: I am insisting that you identify the room.

Mr. Soares: This is cross-examination.

The Court: I understand, but please conform to the Court's ruling. Identify the room that you are referring to in your question.

Mr. Soares: But I am not referring to any particular room.

The Court: Mr. Soares, I thought I made my position clear on the record. There is nothing further for you to say.

Mr. Soares: I have no room in mind. I have no knowledge in what room that Kong next spoke, so I cannot identify the room.

The Court: You are cross-examining him on the basis of this man's direct examination. You have the kitchen and bedroom in mind. You are asking him about this conversation. If you are referring to a room, identify it. If you are not, [31] make that clear also. Proceed.

(Testimony of Samson N. Peneku.)

Mr. Soares: I am not referring to a room.

The Court: I don't want any more talking.

Mr. Soares: I am addressing the witness.

The Court: Proceed.

Q. (By Mr. Soares): Without referring to what room or where it may have been, what was it that Kong said to you first as near as you can recall after he said to you in the kitchen, "You, I want to see you"?

A. I don't recall what he said.

Q. What is the first thing that you can recall that he said after he said, "You, I want to see you"?

A. I never said nothing.

Q. Regardless of where he may have been when he said—— A. I never said nothing.

Q. Not what you said, what Kong said. What is the first thing that Kong said that you can remember?

A. That is what he said, "I want to see you."

Q. Now after that what did he say whether in the kitchen, in your father-in-law's room or out in the yard or wherever it may have been?

A. Well, in my father-in-law's room that is what he said, "I want you to vote not guilty."

Q. As soon as you got inside the room, he said that? A. Yes. [32]

Q. When he said, "I want you to vote not guilty," did you say anything?

A. Yes, sir. I said, "no, no, no."

Q. And after you said "no, no, no," did he say anything more?

(Testimony of Samson N. Peneku.)

A. He didn't say nothing. I opened the door right up.

Q. Did you say anything more to him after you said "no, no, no"?

A. Not until we left the room.

Q. And when you left the room, what did you say to him?

A. We went to the kitchen and then there I told him he better pack his goods and get out.

Q. And did he get out? A. Yes, sir.

Q. Did he pack any goods with him?

A. Yes, he took all his beers with him.

Q. Do you mean all that was left?

A. Yes, I don't know how much was left in the package.

Q. Did anybody go with him?

A. Mrs. Gohier.

Q. Nobody else? A. Nobody else.

Q. When was it that he said something about Harriet being a great friend of his? When was it he first mentioned Harriet's name? [33]

A. When we was in the room.

Q. In what connection did he mention her name?

A. I don't in what connection, but he said Harriet was a good friend of his.

Q. When did he say it in the room, when in reference to other things that he said?

A. Well, it happened when he asked me to vote not guilty.

Q. At the same time? Before you said anything?

A. Yes, sir.

(Testimony of Samson N. Peneku.)

Q. Will you tell us all he said before you said "no, no, no," in that room, your father-in-law's room.

A. Well, when we got in there—he opened the door, stepped inside and as he closed the door, and he asked me, "I want to do one favor."

And I told him, "What is it?"

And he said, "Vote not guilty."

And I said, "No, no, no."

And then at that time he said that Harriet was a good friend of his and then he paused for a little while.

Q. Then he what?

A. Paused for a little while and he said he can't give me anything because he is broke and he had no money.

Q. When did he say that?

A. Right in the room. [34]

Q. Now, why didn't you say that in answer to Mr. Richardson's questions? A. Well, I——

Mr. Richardson: I object to the question, if your Honor please.

The Court: The objection is overruled.

Q. (By Mr. Soares): Can you answer the question?

A. Well, I didn't quite understand what he said.

Mr. Soares: Will you read the question, please?

(The question was read.)

Q. (By Mr. Soares): That refers to what you just said about him being broke and couldn't give you anything.

(Testimony of Samson N. Peneku.)

The Court: Do you understand the question?

The Witness: I didn't quite understand Mr. Richardson's question at that time.

Q. (By Mr. Soares): You say you are working as a welder for Honolulu Gas Company?

A. Yes.

Q. And were you working as a welder at the time you were drawn on the jury?

A. Yes, I was still working.

Q. How long had you been working?

A. Twelve years now.

Q. What was your rate of pay?

Mr. Richardson: I object to this as being [35] immaterial.

Mr. Soares: I would like to point out to the Court why I think it is material.

The Court: If you are speaking to the Court, stand up.

Mr. Soares: I didn't want to state it in the presence of the jury.

Colloquy at Bench

Mr. Soares: Although I have no witness to corroborate it, it is my information that this man made a statement that he was glad to get off of the jury because he would lose too much money from his pay if he remained on the jury. That is what I was leading up to.

The Court: You may proceed.

(Colloquy at the bench ended.)

Mr. Soares: I take it the question is allowed.

The Court: Read the question please.

(Testimony of Samson N. Peneku.)

(The question was read as follows:)

"Q. What was your rate of pay?"

Q. (By Mr. Soares): I mean as a welder for the gas company at the time you were selected as a juror? A. I was geting $1.87 an hour.

Q. Did you have any overtime?

A. No overtime.

Q. Did you work forty hours a week?

A. Forty hours a week. [36]

Q. No overtime?

A. The only overtime we have is in case of an emergency.

Q. Was there any overtime work going on at that time? A. No.

Q. Did you say $1.80 per hour?

A. $1.87 per hour.

Q. Did you know what your rate of pay as a juror was going to be? A. Yes, sir.

Q. How much? A. $7.00 a day.

Q. As a matter of fact, Mr. Peneku, you are quite happy to get off of the jury because you would have lost money if you stayed on the jury?

A. I would not have lost money because the company pays me the difference.

Q. They paid you whether you worked or not?

A. Yes, sir, they pay the difference between what I get paid by the government and my salary.

Q. They pay the difference? A. Yes, sir.

Mr. Soares: No further questions.

The Court: Any redirect examination?

Mr. Richardson: No other questions.

The Court: You are excused. [37]

(Witness excused.)

The Court: Before calling the next witness, it being five minutes of the hour we will take our recess at this time. The jury is to be aware of my instructions not to discuss this case.

(A recess was taken at 10:55 a.m.)

After Recess

The Court: Note the presence of the jury and the defendant, together with counsel.

Please call your next witness, Mr. Richardson.

Mr. Richardson: I call Mrs. Peneku.

EMMA H. PENEKU

a witness called by and on behalf of the plaintiff, having been duly sworn, testified as follows:

The Court: Please state your name.

The Witness: Emma H. Peneku.

The Court: Are you over 21?

The Witness: Yes, sir.

The Court: Where do you live?

The Witness: I live at 1128 Gulick Avenue.

The Court: You are the wife of the man who first testified in this case?

The Witness: Yes, sir.

The Court: Are you a citizen of the United States?

The Witness: Yes, sir. [38]

The Court: Only?

(Testimony of Emma H. Peneku.)

The Witness: Yes, sir.

The Court: Speak good and loud so everyone can hear you.

Direct Examination

By Mr. Richardson:

Q. Mrs. Peneku, you are the wife of Mr. Peneku who just testified? A. Yes, sir.

Q. Do you know the defendant in this case, Stephen Kong? A. I know him now.

Q. Do you see him in the court room?

A. Yes, sir. He is right there next to Mr. Soares.

Q. Has he been to your house?

A. Yes, he has.

Q. I will ask you specifically on November 8, 1952, which was a Saturday, did he come to your house that day? A. Yes, he did.

Q. And Mrs. Peneku, had he been to your house before that day?

A. Well, probably but I didn't see him. I mean —no—I mean I didn't see meet for sure until the day he came to my house. I am not sure that he visited before. I am not sure. [39]

Q. Do you recall if you saw him before that day?

A. No, not before the morning of the 8th.

Q. The morning of the 8th? A. Yes.

Q. Did you know Stephen Kong before that time? A. Yes.

Q. Had you met him? A. Yes.

Q. Back to November 8th, Saturday, when did he first come to your house that day?

(Testimony of Emma H. Peneku.)

A. Saturday morning.

Q. Who was with him, if anyone?

A. He came alone.

Q. He came alone? A. Yes, sir.

Q. Is Minnie Gohier your niece?

A. Yes, sir.

Q. Was she there at that time?

A. Yes, sir.

Q. At the time he came on Saturday morning?

A. Yes.

Q. What did they do there at that time, if you remember?

A. Well, I understand he came to eat breakfast.

Q. Did he eat breakfast? [40]

A. Yes, sir.

Q. How long did he stay on that morning, if you know? A. For a few minutes.

Q. Did he come back later on in the same day?

A. Yes, sir.

Q. Do you know about what time that was?

A. Between 7:30 and 8:00.

Q. Was anyone with him?

A. Yes, my niece.

Q. Is that Mrs. Gohier? A. Yes.

Q. Mrs. Peneku, do you know if Mrs. Gohier and the defendant, Mr. Kong, recently got married?

A. They were married two days ago.

Q. Now, Mrs. Peneku, on the night of November 8th, when he and Mrs. Gohier came there, who else was in the house?

A. Well, there was grandpa and the children, her children and my grandson. I think they were the only ones.

(Testimony of Emma H. Peneku.)

Q. You say her children. Do you mean Mrs. Gohier's children? A. Yes.

Q. How many children were there?

A. Three.

Q. And they were all hers? A. Yes. [41]

Q. And they were all there in the house?

A. Yes.

Q. Now, was Mr. Peneku there?

A. Yes, he was.

Q. Mrs. Peneku, what was Mr. Peneku doing when Mr. Kong came, if you know?

A. I don't know—he was lying down in the kitchen. You see our kitchen and dining room is one big room and on the side there is a little punee and he was lying there in his pajamas.

Q. Was he reading?

A. Reading a Life magazine, looking at the pictures.

Q. Did Mr. Kong and Mrs. Gohier bring anything with them? A. Yes, sir.

Q. What did they bring?

A. They brought along some beer.

Q. Do you know how much beer?

A. No, I don't know. It was a big package.

Q. Do you know who drank the beer?

A. I think grandpa had a can.

Mr. Soares: I didn't hear the answer.

(The answer was read.)

Q. (By Mr. Richardson): Did anybody else have a can, if you know? [42]

A. Minnie, my niece, and Mr. Kong were drinking it.

(Testimony of Emma H. Peneku.)

Q. Minnie is your niece? A. Yes, sir.

Q. Did you and Mr. Peneku drink anything?

A. No.

The Court: Just a minute. You will have to speak louder and more distinctly.

Q. (By Mr. Richardson): You stated, Mrs. Peneku, that Mr. Peneku was lying on the punee?

A. Yes, sir.

Q. What were the rest of you doing, you and grandpa, and Mr. Kong and Mrs. Gohier?

A. Well, I just wasn't sitting down when they came in. I was rushing around doing my work. As soon after they came in I imagine they were introduced, but Sam is the type that doesn't acknowledge an introduction.

Mr. Richardson: I wonder if you would speak a little and a little clearer.

The Witness: They came in. I knew they were coming before they got there. I knew he was coming before he came there. He called and talked to Clayton, Minnie's oldest boy.

Q. (By Mr. Richardson): When you say he came, whom do you mean? A. Mr. Kong.

Q. When they got there, what did you do, sit at a table? [43] A. Not right away.

Q. Just tell us what happened.

A. Well, I imagine Sam just didn't respond to the introduction. I wasn't there at the time he was introduced, but I imagine Sam just didn't respond to the introduction.

Mr. Soares: May I have the answer read?

(Testimony of Emma H. Peneku.)

(The answer was read.)

Q. (By Mr. Richardson): By Sam, do you mean your husband? A. Yes, sir.

Q. Do you and the rest sit around the table?

A. There wasn't anybody talking. I came in and sat down and talked. My husband wasn't paying any attention to us.

Q. He was on the punee? A. Yes.

Q. Now, do you and the rest of them there, including Mr. Kong, have a conversation, were you talking? A. Yes, we were talking.

Q. Do you recall what you were talking about?

A. Everything from Ford cars to pheasant leis.

Mr. Soares: May I have the answer read?

(The answer was read.)

Q. (By Mr. Richardson): Was Mr. Kong in the conversation, was he talking with the rest of them? [44] A. Yes, sir.

Q. Did he mention any names of any persons?

Mr. Soares: Objected to as leading and suggestive.

The Court: The objection is sustained. Ask her what was said.

Q. (By Mr. Richardson): What was said, Mrs. Peneku, in the conversation there?

A. Nothing in particular. We talked about pheasant leis. Grandpa makes them, so we discussed that, and he said he was going to Maui to paint a house.

Q. Who said that? A. Mr. Kong.

(Testimony of Emma H. Peneku.)

Q. What else did he say?

A. He said—I have forgotten about how it started.

Q. What other things did you talk about, if anything?

A. He said he was going to paint his mother's house; that his mother had a case coming up and he said he was going to get Harriet to work on it. He said Bouslog, you know, the wahine attorney.

Q. Will you repeat that, please.

A. He is going to Maui to paint his mother's house. He said, "My mother has a case coming up," and he said he was going to have Harriet work on it.

So I said, "Who?"

And he said, "Bouslog, the wahine attorney. She is a [45] a damned good attorney."

Q. He said what?

A. He said she was a damned good attorney.

Q. Mrs. Peneku, do you recall if anything else was said in the conversation? A. Well, no.

Q. Did you talk about anything else?

A. I guess then he stood up and wanted to get Sam off to talk privately.

Q. What did he say?

A. He said, "You come. I want to talk to you."

Q. To whom? A. To Sam, my husband.

Q. What happened then?

A. Well, he didn't just get right up, and he walked over and I think he grabbed Sam by the hand.

Mr. Soares: May I have what she first said in

(Testimony of Emma H. Peneku.)

this answer. I have the last part of the answer, but there were some words preceding that which I did not hear.

The Court: Yes. But if you want an answer read, wait until it is finished. Don't interrupt it just because you don't happen to hear something at the beginning. We will gladly reread it for you.

(The answer was read.)

Mr. Soares: I move that that portion of the answer [46] "I think he grabbed Sam by the hand," be stricken, if the Court please.

The Court: What do you mean by the word "think"? Do you know whether he did or not?

The Witness: He did.

Q. (By Mr. Richardson): Did he say anything?

A. Not roughly. He just grabbed his hand.

The Court: Wait a minute. You will have to speak out so we can hear every word.

The Witness: It wasn't a rough pick up or anything, just like two friends might walk off. I am sorry, but I can't talk any louder.

Mr. Richardson: Do the best you can.

Q. (By Mr. Richardson): Now, Mrs. Peneku, didn't you say a minute ago he said he wanted to talk to Sam? A. Privately.

Q. Did he say that to you or who?

A. He said that to Sam. And I said, "Why?"

Q. Who said that?

A. I did. And he said, "on some family affair." And then they walked off.

(Testimony of Emma H. Peneku.)

Q. Where did they go?

A. In through a little hall, through the parlor to grandpa's room.

Q. Just the two of them? [47]

A. Yes, sir.

Q. Did they later come back in the dining room and kitchen together?

A. They did, and Steve and Minnie pulled a fast exit and Sam came out so mad.

Q. You could tell that? A. Oh, yes.

Q. And then you say Mrs. Gohier and Mr. Kong left immediately?

A. They walked right out and I said, "Wait, take your beer."

Q. Did they take it? A. Yes, sir.

Q. Mrs. Peneku, at the time you were sitting there, at the time of the other conversation you told us about, about going to Maui to paint his mother's house, did he say anything else about going to Maui?

A. That was all, that was his reason for him going to Maui.

Q. Was there any other discussion on any other subject?

A. Oh, that I wanted to be on the jury.

Q. What was said about that?

A. That I am ashamed of. I said, "Now that they are picking women for the jury, I wish some day they would pick me." [48]

Q. Did you say why?

Mr. Soares: May I have the question read, please?

(Testimony of Emma H. Peneku.)

(The question was read.)

Q. (By Mr. Richardson): I think you said you would like to be on the jury? A. Yes.

Q. Did you give any reason for that?

A. I said I would make everyone guilty.

Mr. Soares: What is that?

Q. (By Mr. Richardson): What did Mr. Kong say to that, if anything?

A. He said, "You mean to say you would make my mother guilty?"

I said, "Oh, no, Steve. At the moment I didn't think about your mother."

Q. Mrs. Peneku, can you estimate how long Mr. Kong and your husband were out of the room before they came back? Do you know what length of time it was?

A. It wasn't so long, about five minutes, maybe.

Q. About five minutes or so? A. Yes.

Mr. Richardson: I believe that is all.

The Court: Before we begin cross-examination, Mrs. Peneku, it isn't that you don't speak loudly enough, [49] but you drop your voice. Don't drop your voice until you come to the end of your statement. Keep your voice up so we can hear every word that you say.

All right, you may cross-examine.

Cross-Examination

By Mr. Soares:

Q. Can you recall when it was that you first saw Mr. Kong in your life?

(Testimony of Emma H. Peneku.)

A. About two or three months before this incident.

Q. Was Minnie with him at that time?

A. Yes, sir.

Q. And where was it?

A. At her home in Kahaluu.

Q. Can you recall when it was that you first saw Mr. Kong in your home on Gulick Avenue?

A. Saturday morning, November 8.

Q. The Saturday in question? A. Yes.

Q. Were you working at that time?

A. Yes, sir.

Q. Where were you working?

A. For the Hawaiian Pineapple Company.

Q. And is that seasonal employment, or are you steady? A. I am a steady employee.

Q. What were your working hours at that [50] time? A. 7:30 to 3:30.

Q. I beg your pardon?

A. 7:00 to 3:30, five days a week.

Q. That is, you have Saturdays and Sundays off?

A. At that time, yes, sir. Now we are working Saturdays.

Q. I am talking about that time. A. Yes.

Q. Minnie was in the habit of bringing her children from the other side of the island and leaving them at your home? A. Yes, sir.

Q. And Kong was also in the habit of coming and picking her up and taking her back to the other side of the island from your home, was he not?

A. That I do not know.

(Testimony of Emma H. Peneku.)

Q. You never heard of that? A. No.

Q. I understand you never had seen him at your home?

A. Not before Saturday the 8th of November.

Q. Did you ever discuss Stephen Kong with your husband, with particular relation to his interest in Minnie? A. With my husband?

Q. Yes. A. No, sir. [51]

Q. Then you discussed him with Minnie?

A. Yes.

Q. Did you or did you not have a breakfast with them that morning at your home?

A. I did not have breakfast with them.

Q. You saw him come in, did you? You saw Stephen Kong come in there that morning?

A. I came up from the washroom and he was in my kitchen.

Q. And what took place between you and him on that occasion?

A. Nothing at all. I just said "Hello."

Q. You said "Hello?" A. Yes.

Q. And did he greet you, too?

A. Yes, sir.

Q. Was everything pleasant? A. Yes.

Q. And you returned home at what time?

A. I was home.

Q. You were there all day? A. Yes, sir.

Q. What time did Stephen leave that morning?

A. Within about a half-hour.

Q. Were you and he and Minnie and the rest of you in [52] the company of each other all that time? A. No, no, not me.

(Testimony of Emma H. Peneku.)

Q. Did you have any conversation with him during that half hour that he was there that morning?

A. No, as I came from the washroom he was eating breakfast and I wanted him to know he was welcome and I said "Hello," and I walked off to do my washing.

Q. Were you there when he left that morning?

A. No, I didn't see him leave.

Q. Then when did you next see him?

A. That evening.

Q. Where was he when you next saw him that evening?

A. Sitting at the table in our kitchen.

Q. Who else were at the table, if anyone?

A. There was Mrs. Gohier and grandpa, my father.

Q. And who?

A. My father, my step-father, Mr. Maioho.

Q. Anybody else at the table right at that time?

A. No.

Q. Was your daughter-in-law around there?

A. No, she had gone out and come in.

Q. Was she ever seated at the table?

A. Just for a little bit.

Q. Did she have some of the beer?

A. I think she did. [53]

Q. Now, did you say something about you wished you were on the jury in the Smith Act case?

A. No, I didn't want to go on the jury of the Smith Act case.

(Testimony of Emma H. Peneku.)

Q. Just what did you say about wishing you were on the jury?

A. Speaking of juries—they had in the paper where they were going to let women be jurors. I really didn't mean it, but I did say that I wished I was on the jury some day.

Q. I am sorry, I didn't understand you. You did say what?

A. That I wished I would get on the jury sometime.

Q. Are you sure you didn't mention the Smith Act case? A. Oh, indeed not.

Q. And what was it you said about convicting everybody?

A. That is what I am ashamed of. I did say I would make everyone guilty.

Q. You would find everyone guilty?

A. Yes.

Q. The Smith Act case had not been mentioned at all? A. No.

Q. When was it that Kong said he wanted to speak to your husband?

A. The night of November 8.

Q. Well, was that before or after you said you wished [54] you could be on the jury?

A. That was after.

Q. After that? A. Yes.

Q. Had something else been said in between?

A. Yes.

Q. Do you recall what it was?

A. No. He got mad because I said——

(Testimony of Emma H. Peneku.)

Q. What?

A. When I said I wished I would get to be on the jury, that I would make everyone guilty, he said, "Do you mean to say you would make my mother guilty?"

I said, "Steve, I didn't mean it that way. Iwasn't even thinking of her at the moment."

Q. Was it after that that Kong said he wanted to speak to your husband?

A. Not immediately afterwards. Then we went on talking about his going home to paint the house.

Q. After you explained to him that you didn't mean what you were saying about convicting everybody, he said something about he was going to Maui to paint the house?

A. Yes. He said, "I am going to go to Maui to do some little paint job on my mother's house."

Q. From there on was everything pleasant?

A. Yes. [55]

Q. After he said, "I am going to Maui to do a little paint job on my mother's house," do you remember what you said, if anything?

A. I probably said, "When?"

And he must have told me, but I forgot.

Q. He didn't indicate that he had already gone to Maui? A. No, he was going.

Q. Going later? A. Yes.

Q. Then after a little more he said something about "I want to talk to Peneku?"

A. I know what—there came a telephone call that the baby was awake, she said "Come on, Steve, let's go."

(Testimony of Emma H. Peneku.)

Then he went to Sam, "You, I want to talk to you."

Q. That is, a telephone call came? A. Yes.

Q. And who answered the phone?

A. Minnie.

Q. And what was said?

A. That the baby was awake; they had to go home.

Q. Where did the phone call come from?

A. From Lillian Gohier's house on Beckley Street.

Q. Who was talking over the phone?

A. Somebody from that house called to my house and she [56] answered the phone. Then she said, "Come on, we will go. The baby is awake."

And he said, "Wait, wait."

Q. Do you know what baby she was referring to?

A. Her baby.

Q. Where was her baby?

A. With her sister-in-law.

Q. At some other house than yours?

A. Yes.

Q. It was not until they were ready to go that Steve said he wanted to talk to Mr. Peneku?

A. Yes.

Q. And up until that point, except for this little passage, everything was pleasant? A. Yes.

Q. And as soon as Steve said, "Wait, wait, I want to talk to Peneku," you jumped right in and said, "What for?"

(Testimony of Emma H. Peneku.)

A. Yes, because I felt if he had anything to tell my husband, why didn't he tell it right there. I was there. I wanted to listen.

Q. You used the same tone of voice that you used on direct examination when you said, "What for?" You were a little bit worried over it?

A. Yes.

Q. And what did he reply when you asked [57] him?

A. He said, "I am just going to talk family trouble."

Mr. Soares: No further questions.

The Court: Any redirect examination?

Redirect Examination

By Mr. Richardson:

Q. You mentioned some beer there and the people drinking the beer. Did anybody in the place at all appear to be drunk?

A. Oh, no, nobody was drunk.

Q. Was Mr. Kong drunk? A. No.

Q. Did he appear to be under the influence of alcohol at all? A. No, no.

Q. Did anybody else seem to be? A. No.

Mr. Richardson: I believe that is all.

Mr. Soares: Nothing further.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Richardson: If your Honor please, may we approach the bench just a second?

The Court: Yes.

(Colloquy at Bench.)

Mr. Richardson: You indicated in response to my request to be permitted to ask the jury about Bouslog and [58] Symonds that you would not let me go into the fact that they did represent his mother. I want to make an offer of proof that they did represent his mother for the reason it shows motive and corroboration of the testimony of these witnesses.

I have the clerk here from Maui. I didn't want to put him on since your Honor indicated this morning you would not let me go into it, but I want to reapply for it and I would like to make an offer to show by the clerk that Bouslog and Symonds did represent Louise Kong, the defendant's mother.

Mr. Soares: Will you show further that it was Harriet Bouslog——

The Court: Just a moment. The record shows it was Jim King.

Mr. Soares: Here is what happened: Bouslog and Symonds represented this Mrs. King who had murdered her husband. They filed a motion to have her examined mentally, which James King prevented and which motion was granted, as a result of which she was sent to the asylum and the case dropped.

How do those facts prove any issue in this case. Those are all the facts. I don't have the dates that is only thing I don't have.

Mr. Richardson: I have the clerk here and he

has the motion. The motion was filed by Bouslog and Symonds.

The Court: I am not interested in the Maui case, [59] as such. The only thing I would be interested in would be that there was a case in which this defendant was interested, in which the party defendant was represented by Bouslog and Symonds.

Mr. Richardson: I would have to show it is his mother's case.

The Court: Yes.

Mr. Richardson: I would not go into the facts of the case.

The Court: You already have that in evidence.

Mr. Richardson: Yes. I have the clerk here, too, with actual records showing that Bouslog and Symonds did appear.

Mr. Soares: We maintain that supposing they did represent her, how is that material to the evidence?

The Court: Only that it might be relevant as to motive. That is what he is offering it for.

Mr. Soares: How could there be a motive?

Mr. Richardson: The jury should be entitled to draw an inference, if one can be drawn.

Mr. Soares: They have to draw their inferences——

The Court: I think standing alone it is rather doubtful and dubious. If you have some evidence to show that some member of that firm asked him to do that——

Mr. Richardson: Oh, no. [60]

The Court: I think it is too dangerous.

Mr. Richardson: Even on the ground showing the motive?

The Court: If he takes the stand, I will let you ask him.

Mr. Richardson: Let me ask Kong?

The Court: Yes. The most you could get in would be there was a case in which his mother was interested, in which his mother was represented by this law firm, and you have that in evidence twice. You have it once indirectly by Mrs. Peneku and by inference in the testimony of Mr. Peneku.

Mr. Richardson: This would be just corroborating.

The Court: It isn't of sufficient importance to allow it.

Mr. Richardson: All right.

(Colloquy ended at bench.)

Mr. Richardson: Will you excuse me one second?

The Court: Yes.

(Counsel confer.)

Mr. Richardson: That is the government's case.

Mr. Soares: I am taken by surprise at the rapidity of the government's case and ask the Court that we take our midday recess now and return at some hour after lunch.

The Court: No, I think you had better go [61] ahead now. You were told at the time I asked about the time factor that this case might be concluded in one day. We will proceed.

Mr. Soares: Then may I have a moment to consult with my client?

The Court: We will take a short recess for that purpose. Do I understand clearly that you are not making an opening statement?

Mr. Soares: That is correct.

(Mr. Soares and the defendant step out of the court room, after which the jury leaves the court room.)

Mr. Soares (Returning to the court room): I did not mean to transgress the Court's rules.

The Court: I can understand that might happen but I want you to agree that nothing happened in the filing out of the jury after you stepped outside the door with your client.

Mr. Soares: Very definitely not. I had my back turned. I stepped off a few feet. I had turned around and saw that the jury was leaving and it occurred to me that I had left the court room in a violation of the rule. I started right back in and nothing was said by anyone or done by anyone.

The Court: All right. We will take a five minute recess.

(A recess was taken at 11:38 a.m.) [62]

After Recess

The Court: Note the presence of the jury and of the defendant together with counsel.

Mr. Soares: Would the Court pardon me just a moment?

The Court: Yes.

Mr. Soares: Will Stephen Kong take the stand?

STEPHEN KONG, JR.

the defendant in this case, having been duly sworn, testified as follows:

The Court: Please state your name.

The Witness: Stephen Kong, Jr.

The Court: Speak good and loud and distinctly. How old are you?

The Witness: Thirty-two.

The Court: Where do you live?

The Witness: Kaneohe.

The Court: And where in Kaneohe?

The Witness: In the city, Kahaluu.

The Court: What is your occupation?

The Witness: Fire-fighter.

The Court: Employed by whom?

The Witness: City and County.

The Court: Are you a citizen of the United States of America [63]

The Witness: Yes, I believe so.

The Court: Only?

The Witnes: Yes, sir.

The Court: Take the witness.

Direct Examination

By Mr. Soares:

Q. Mr. Kong, how long have you been employed as a fire fighter for the City and County?

A. Going to three years.

Q. Did you say going to three years?

A. That is right.

Q. Before that where were you employed?

(Testimony of Stephen Kong, Jr.)

A. As a fire fighter for Hickam Field.

Q. Where did you attend school?

A. St. Anthony's in Wailuku, Maui.

Q. Did you go to high school? A. Yes.

Q. Did you complete high school? A. Yes.

Q. Did you attend any other school after that?

A. No, sir.

Q. You are the defendant in this case?

A. Yes, I am.

Q. Were you at the home of Mr. and Mrs. Peneku on Gulick on Saturday, November 8, last year? [64] A. Yes, sir.

Q. How many times were you there that day?

A. Twice.

Q. When was the first time?

A. After I got through working in the morning at 8:00 o'clock and I went over there to change clothes, dressing clothes that Minnie brought up the previous evening.

Q. Is Minnie Mrs. Gohier, the niece of Mrs. Peneku? Is that the Minnie you mean?

A. That is right.

Q. Can you give us some idea about the time you arrived at the Peneku home?

A. About 8:30 in the morning.

Q. When you got there, with whom did you speak?

A. With Mr. Maioho, which is Mrs. Peneku's step-father. That is Minnie's step-father by adoption, too. He was there, Minnie was there and Mrs. Peneku came in the house when I got there.

(Testimony of Stephen Kong, Jr.)

Q. How long did you remain there on that occasion? A. Oh, 45 minutes, I believe.

Q. And from there where did you go?

A. Then me and Minnie left and went about the business we had planned to do that day.

Q. Went where?

A. In town to do some shopping. [65]

Q. Was Mrs. Peneku there all the time you were there that morning? A. Yes, she was there.

Q. The whole 45 minutes?

A. She was doing her laundry and she has to go in and out of the house. She was conversing and also pitching in the conversation that me and her step-father were talking about. We were talking about his pheasant leis and the things he was doing around the house and that is all.

Q. Had you ever been at that home before that day?

A. Not in the home. I had been there about four or five times to pick up the children or either bring them and leave them there.

Q. Will you explain what you mean when you say you were not in the home, but you left the children there and picked them up four or five times?

A. Well, I drive up or catch a taxi and leave the children off at the gateway and say goodbye and then I run along.

Q. That is, you did not go into the home?

A. No, not in the home.

Q. Is that the first time you had been inside the home that morning?

(Testimony of Stephen Kong, Jr.)

A. No, I had been in there once when her father was home and neither of them two were home. [66]

Q. Neither Mr. or Mrs. Peneku?

A. No, they weren't there at the time when I was there, but I had been in the home.

Q. About the yard or around the front of it had you ever seen Mr. Peneku around there on any of those occasions?

A. I have seen about three times that I have been there.

Q. Did he say anything to you or you to him?

A. I nodded or spoke to him, but there is no response.

Q. What time did you return to that home?

A. It was rather late in the evening. I can't recall the time exactly. I would say around 6:00, somewhere around there.

Q. Well, was it still daylight?

A. Just about dark.

Q. And who came with you when you returned that evening, if anyone?

A. Me and Minnie, and we stopped in the grocery store there and then she said, "Well, I think I will call up grandpa and ask him if he wants some beer." And he said he can stand one or two so I went ahead and got a half dozen and we went up there.

Q. And where did you take the beer.

A. I took it into the home of Mr. Peneku and set it on the table and I invited Mr. and Mrs. for a beer.

(Testimony of Stephen Kong, Jr.)

Q. When you got into the home, to what room did you go? [67] A. In the dining room.

Q. Who, if anyone, went with you?

A. Just Minnie and myself.

Q. Before you got into the dining room, had you seen anybody in the house?

A. Oh, yes. We met grandpa at the door because he was expecting us.

Q. That is Mr. Maioho? A. Yes.

Q. And did you leave him at the door when you went into the dining room, or did all three of you go in together?

Mr. Richardson: I object to this as leading.

The Court: The objection is sustained.

Q. (By Mr. Soares): After you met Maioho at the door where did you go, where did Minnie go and where did Maioho go?

A. Oh, Maioho sat us at the table and told us to make ourselves comfortable and he would join us shortly, and he did so. He went on ahead and got the opener for the beer and poured himself one and Minnie one and myself one. Later on the daughter-in-law came in the house and I asked her if she cared for a beer. She said she didn't mind and the four of us sat down and drank four beers.

Q. Did you have more than one beer?

A. I had two of them. Two beers I believe I had. [68]

Q. Did that have any effect on you at all, the beer? A. No.

Q. You can stand two beers?

(Testimony of Stephen Kong, Jr.)

A. I can stand two beers.

Q. Now, when you came into the dining room or kitchen or both——

A. It is a kitchen and dining room. It is just open. There is no partition between the kitchen and dining room.

Q. Did you see Mr. Peneku that evening?

A. Yes, after we got in the home there and grandpa seated us at the table then Minnie said, "Come over I want you to meet my uncle." So she made the introduction and he didn't respond to the introduction and I went ahead and went back and sat down to the table.

Q. Where was he when Minnie told you to come over she wanted you to met her uncle?

A. Some ten feet away from the table where we were sitting. He was against the wall on a punee reading a magazine.

Q. What position was he on the punee, stretched out, sitting down, or what?

A. Making himself comfortable so he could read, on his back, perhaps, or on his side or something like that.

Q. Now, after Minnie attempted to make this introduction, which Peneku did not asknowledge, what did you do? [69]

A. I went back and sat down. Well, you know how any man would feel about introductions. I didn't know and I sat down.

Mr. Richardson: I object to this man's views on the way people feel about introductions. It is not responsive to the question.

(Testimony of Stephen Kong, Jr.)

The Court: That is true, however, the answer may stand as it is his manner of answering.

Q. (By Mr. Soares): Without regard to how any man may feel, how did you feel when Mr. Peneku acted as he did?

A. In my opinion, I liked the Mrs. very well——

Mr. Richardson: I object to his opinion.

The Court: It may go out. You are correct.

Q. (By Mr. Soares): Just answer the question. How did you feel when Peneku made no response to the introduction?

A. I felt like any other man would feel.

Q. Well, describe your own feelings.

A. It was satisfactory in my opinion. It didn't hurt me a bit, none whatsoever.

Q. It didn't hurt you a bit? A. No.

Q. Had you any occasion to see Peneku around there before that?

A. Yes, sir, I had seen him the few times I did pick the children up, or vice versa, or drop them there. If he [70] was in the yard and I approached, I don't know if it was one of his ways, but he walked away. If I nodded to him or said "hello" there was no response.

The Court: We will take our noon recess at this time and we will reconvene at 2:00.

The Clerk: At 1:30 we have a sentence.

The Court: The jurors and the parties are excused until 2:00 o'clock. Court will stand at recess until 1:30.

(A recess was taken at 12:00 o'clock [71] noon.)

(Testimony of Stephen Kong, Jr.)

Afternoon Session—August 14, 1953

(The trial resumed at 2:00 o'clock p.m.)

The Clerk: Criminal No. 10,704, United States of America, plaintiff, vs. Stephen Kong, Jr., defendant, for further trial.

The Court: Note the presence of the defendant together with counsel and also the presence of the jury.

Mr. Defendant, I remind you that you are still under oath and under the necessity of speaking loud and clear. You may continue.

Direct Examination
(Continued)

By Mr. Soares:

Q. After Minnie took you over to introduce you to Mr. Peneku and you got no response, what did you do?

A. I went back and sat on a table where we were sitting.

Q. And who all were at the table when you got back?

A. Mr. Maioho, Minnie, Mrs. Peneku.

Q. Did Mrs. Peneku sit around the table?

A. Yes, and we started conversing about everything else.

Q. Now, later, did you say anything to Mr. Peneku?

A. No, I didn't say anything to Mr. Peneku.

Q. I say, later that day at any time?

(Testimony of Stephen Kong, Jr.)

A. Yes, I did talk to him.

Q. With relation to the time you were ready to leave, to [72] go home, when was it that you talked to Mr. Peneku?

A. Oh, just before we were leaving the place I went over and asked him that I wished to make my introduction more clearly and I want to speak to him about Minnie and this and that. And I felt that it wasn't nice of me to bring up family argument in behalf of the grandfather and the rest of the guests that were sitting at the table so I asked him if he wouldn't mind to discuss about me and Minnie elsewhere. And he say, well, let's go in the parlor somewhere else.

Q. You heard Mrs. Peneku testify that you went over to Mr. Peneku and said you wanted to talk to him and that she said "What for?" That's correct, isn't it?

A. She said that but not in the tones—she told me was it necessary for me to go elsewhere and talk about the family rather than in front of the grandfather. I say "Yes," because he always wanted us to go up there and he lived there so the only means of us to see him is to go there to Peneku's place.

Q. Now, what took place between you and Mr. Peneku when you got into this other room?

A. Well, I accused him of being impolite to go away from the family, but I told him that I felt that I wanted to bring up about family argument mostly about myself and Minnie.

Q. What did he say in reply to that?

(Testimony of Stephen Kong, Jr.)

A. Oh, he said that he doesn't approve of me going around with Minine. [73]

Q. And was that all the conversation you had with him in that room?

A. Yes, it was all on family affairs.

Q. And how did the conversation end up? How did you leave the room?

A. Well, after I told him that about everything else, he went ahead and told me that in the first place he didn't like me. He said he didn't like me to go along with Minnie. He told me not to come over to the house anymore.

Q. Did you mention Harriet Bouslog in a conversation with Peneku? A. No, I did not.

Q. Did you mention Harriet Bouslog anytime that afternoon? A. Yes, I did.

Q. Or evening, I should say. To whom did you mention Harriet Bouslog?

A. Well, when Mrs. Peneku asked me who my mother's attorney is going to be, so I said that my sister is handling her case and I heard from her that she going to ask Harriet Bouslog to take the case.

Q. What had been said by anyone just prior to Mrs. Peneku asking you who your mother's attorney was going to be? A. I don't quite get you.

Q. What had been said just before Mrs. Peneku asked you that question? [74]

A. Well, she was talking about the seven defendants on the Smith Act.

Q. Who was talking? A. Mrs. Peneku.

(Testimony of Stephen Kong, Jr.)

Q. Who brought up the subject?

A. She brought the subject up.

Q. What did she say in connection with the Smith Act case?

A. She asked the husband what is the news of the day. And so how she just came out and she say—well, I guess the topic of the news nowadays is the Smith Act trial, and she say if she were on the jury she would see to it that everyone would be convicted.

Q. Did anybody reply to that?

A. I did. I told her that it is not nice to say things like that unless there is proof and evidence that each and everyone of us be justified. In other words, not somebody else. That is her opinion. So I in turn said, well, somebody is on trial. I guess if your opinion is like that, I guess I will find my mother guilty, too.

Q. And is that what she asked you, who your mother's attorney was?

A. Yes, when she did ask.

Q. And what did you say to her in response to that?

A. I said I heard my sister saying that she is going to have Harriet Bouslog take the case up. [75]

Q. Had you ever talked to Harriet Bouslog about representing your mother?

A. No, I did not.

Q. Or anybody in that firm about representing your mother? A. No, I did not.

Q. Did you say to Mr. Peneku, "I want you to do me a favor"? A. No, I did not.

(Testimony of Stephen Kong, Jr.)

Q. Did you say to Mr. Peneku, "I want you to vote not guilty"? A. No, I did not.

Q. Did you in any way attempt to get Mr. Peneku to vote any particular way in the Smith Act case? A. No, I did not.

Q. Did you have any interest in the outcome of the Smith Act case? A. No.

Q. Did you say to Mr. Peneku that you were broke and couldn't pay him? A. I did not.

Q. Was there any occasion for you to have said that? A. There is no occasion why.

Mr. Soares: You may cross-examine.

Cross-Examination

By Mr. Richardson:

Q. Mr. Kong, when did you and Minnie go here and get married? [76]

A. Got married Wednesday night.

Q. This past Wednesday?

A. That's right.

Q. Now, you have been married before, have you not? A. Yes.

Q. And when did you get your divorce?

A. Last month, on the 21st.

Q. You say last March, or last month?

A. Last month.

Q. That would be July? A. Yes.

Q. And do you have any children by your first marriage? A. Yes, I have.

Q. How many? A. I have four.

Q. And where are those children now?

A. Well, three is living with the mother at present and one my future wife is custodian adopted.

(Testimony of Stephen Kong, Jr.)

Q. Well, now, when you say "future wife," you mean Minnie? A. No, I mean——

Q. Your present wife? A. Yes.

Q. Do you support your children?

A. Yes, I do.

Q. Now, does Minnie have any children? [77]

A. Yes, she has.

Q. How many does she have?

A. She's got four.

Q. And who is supporting them?

A. Well, she is living on compensation.

Q. Sir? A. Social security.

Q. Social security? Well, you are also supporting them? A. No.

Q. You are not supporting Minnie's children?

A. No.

Q. You have been going with Minnie for some time, have you not, Mr. Peneku—pardon me, Mr. Kong? A. Yes, I knew her.

Q. Well, you have been going with her for sometime? A. Yes.

Q. About how long?

A. Oh, about a year or so.

Q. About a year or so? As a matter of fact, you have been going with her since about 1950, haven't you?

A. Well, I knew her. I didn't go with her. If that is what you are trying to drive at.

Q. I am just asking how long you have been going with her.

A. Well, I knew her in about '50. [78]

(Testimony of Stephen Kong, Jr.)

Q. Did you go with her at that time?

A. No, I didn't go with her. I went with her after her husband died.

Q. Mr. Kong, was there any particular reason why you and Minnie got married two days before this trial came up?

A. We planned to get married long after her husband died, but my wife didn't give me my divorce until last month.

Q. When did her husband die, if you know?

A. I can't recall the month.

Q. Well, it was at least a year ago, maybe more, wasn't it? A. Yes, about a year, a little more.

Q. Mr. Kong, do you know Harriet Bouslog?

A. Not personally. But I went to see her. That is way before this trial—I mean before I had been called in on this charge. I went to see her and asked her if she could advise me on affairs that I had with the Civil Service.

Q. How long ago was that?

A. That was in '51, I believe.

Q. When? A. '51.

Q. 1951? Well, is that the only time you ever talked to her?

A. That is the only time I ever talked to her.

Q. Have you ever seen her since then?

A. I seen her around, yes, if that is what you mean, but [79] not to talk to.

Q. You haven't talked to Mrs. Bouslog since 1951? A. No, that is the only time.

Q. Well, now, I believe you said she was employed to represent your mother in her case?

(Testimony of Stephen Kong, Jr.)

A. I don't know. I heard from the sisted because my mother was in Maui and I am down here working. And my sister is handling her case. So I heard from the sister that she planned to get Harriet Bouslog.

Q. Your sister told you that?

A. Yes, that she is planning to.

Q. Don't you know that in fact she did get the firm of Bouslog and Symonds to represent her?

A. Not at that time. I don't know.

Q. Do you know it now?

A. Yes, Now I know it.

Q. And that is true, isn't it?

A. That is true, yes.

Q. That that firm did represent your mother?

A. Yes, that is true.

Q. Now, Mr. Kong, you say that you had never met Mr. Peneku before this Saturday that you went to the house?

A. You mean to say that I have been introduced to him?

Q. Yes. [80]

A. No, I didn't even been introduced at the time Saturday I went because as he said that he wasn't so eager of meeting me.

Q. I think you said you have seen him two or three times before that? A. Yes.

Q. And you have said that you would nod to him? A. Yes, I'd nod to him.

Q. And he wouldn't respond?

A. He wouldn't respond.

Q. But you hadn't been introduced to him before that time? A. No.

(Testimony of Stephen Kong, Jr.)

Q. Well, on that day, on January 8th, what was the first time that you went to the house—it was November 8th, excuse me. On this Saturday that we are talking about when did you go to the house, Mr. Peneku's house?

A. In the morning, after I got through working, 8:00 o'clock. Somewhere between 8:30 and 9:00 o'clock.

Q. Now, did you know where Minnie was then?

A. Yes, Minnie was up there.

Q. How did you know that?

A. She told me she was going to stay there, she called me.

Q. When did she call you? [81]

A. Called me in the morning and asked me to come up and have breakfast in her place.

Q. She called you before breakfast the same morning? A. Yes.

Q. Where were you when she called you?

A. Working in the station.

Q. That is where she called, you, at the station?

A. Yes.

Q. So you went to the house and there and what time did you get there?

A. Between 8:30 and 9:00 o'clock.

Q. And who was there?

A. The grandfather, Minnie and Mrs. Peneku.

Q. Well, did you eat breakfast there?

A. Yes, I had my breakfast there.

Q. Who ate with you?

A. Me and Minnie and the grandfather.

Q. Just the three of you? A. Yes.

(Testimony of Stephen Kong, Jr.)

Q. How long did you stay there that morning?

A. A little over an hour or so, something in there.

Q. And where did you go when you left?

A. I had some business to do at the time and Minnie brought up some clothes and I changed there and I went along to do my business. [82]

Q. Well, where did you go?

A. I went in town. I don't know where the hell —I mean, I can't recall what I did that day.

Q. Well, you can't recall what you did that day?

A. You mean after I left there?

Q. Yes.

A. I know I came in town but what my business were——

Q. You don't remember where you went in town? A. I came in town.

Q. Did you meet Minnie again that day?

A. Yes, later part in the afternoon.

Q. About what time?

A. Somewhere around 4:00 o'clock, something like it.

Q. And where did you meet her?

A. Sister-in-law's place.

Q. Is that the lady that was here?

A. That's right.

Q. Mr. Kong, didn't you call Minnie about 1:30 from the Kalihi Market?

A. I did call her, yes. I did call her.

Q. And didn't Minnie meet you there about that time?

(Testimony of Stephen Kong, Jr.)

A. Yes, yes. She came down to meet me.

Q. And didn't you buy a case of beer there at that time? A. Yes, I did. [83]

Q. And took it to Mrs. Gohier's house?

A. Yes.

Q. And that was about 1:30, wasn't it, approximately? A. Yes.

Q. How long did you stay at Mrs. Lillian Gohier's house?

A. We were going to spend the night there.

Q. Well, how long did you stay there?

A. Stayed there—if I recall we slept over there that night.

Q. You slept there that Saturday night?

A. I think we did.

Q. Well, you didn't stay there from 1:30 on until the time you went to bed, did you?

A. Oh, no, no, in the latter part we were—we went marketing again, I think, something like that.

Q. How much of the beer did you drink that afternoon, Mr. Kong? A. I can't remember.

Q. Well, was it two cans or six cans or ten or what? What is your best estimate?

A. Prior to—I went to Peneku's—prior to I went to Peneku's place I think I had about three or four, somewhere around there.

Q. Well, the case was empty by the time you went to [84] Peneku's house, wasn't it?

A. I don't know.

Q. There wasn't any more beer left in the house, was there? A. I don't know.

(Testimony of Stephen Kong, Jr.)

Q. Well, didn't you stop at a store on the way over to Peneku's house and get some more beer?

A. No; went marketing. And if I am not mistaken, I think Minnie called her grandfather and asked him if he cared for some beer. Then I bought six more cans.

Q. You bought six more cans after you bought the case earlier?

A. Yes, I bought the case earlier. That was for Lillian.

Q. Now, Mr. Kong, during the afternoon when you were at Mrs. Lillian Gohier's house, didn't you ask Minnie what kind of a guy is this same Peneku, and didn't she say he is a good Hawaiian and minds his own business? Do you remember that?

A. No.

Q. Did you ask her during that afternoon what kind of a guy Sam Peneku is?

A. No, I didn't.

Q. Are you sure of that?

A. You mean after I got there?

Q. I mean right there that afternoon when you were in [85] the house?

The Court: What house?

Q. Mrs. Lillian Gohier's house where you went with the case of beer?

A. You are talking about Gohier's house?

Q. You are talking about Gohier's house.

A. Yes.

Q. Do you remember if you asked Minnie that question?

(Testimony of Stephen Kong, Jr.)

A. Yes, I think I did ask her how is the family, how is Mr. Peneku, because she told me because Grandpa want us to go down there. So I say, so far as I have been around there he doesn't sound so friendly. So I asked Minnie what his attitude was.

Q. So you asked her what kind of a guy he was?

A. I asked what kind of person he is.

Q. Yes, what kind of person? A. Yes.

Q. And what did you say the reason was you wanted to know that?

A. No reason at all. So she asked me we go over and get——

Q. No, I mean, Mr. Kong, what was the reason you were anxious to find out what sort of a man Mr. Peneku was?

Mr. Soares: Just a minute, if the Court please. That is a misstatement of the evidence. There is no evidence [86] that he was anxious to find out.

Mr. Richardson: I will amend it to that extent.

Q. (By Mr. Richardson): What was the reason you asked Minnie what kind of a man was Peneku?

A. Minnie want me to go to Mr. Peneku's house. Prior to that a few times I went there, he didn't show any friendship. So she say, she told me that that his ways. We go. So I went along with her.

Q. You knew that, didn't you?

A. Knew what?

Q. You knew he hadn't shown you any friendship before?

A. Well, that is why I said that he don't show

(Testimony of Stephen Kong, Jr.)
any friendship so why should I go down to Peneku's place.

Q. And that is the reason you asked what sort of a guy he is?

A. That is why I asked Minnie.

Q. Well, did you finally go over to Mr. Peneku's house the same night?

A. When Minnie asked me to go, I went.

Q. Do you remember telling Minnie that you wanted to meet Mr. Peneku?

A. Well, after she told me that he is not a bad sort of a guy, person, and she want me to meet him.

Q. My question was, Mr. Kong, do you remember telling Minnie you wanted to meet him? [87]

A. To meet Mr. Peneku?

Q. Yes.

A. After she told me he was a friendly guy, I said yes, I would like to meet him.

Q. So you did tell Minnie, then, that you wanted to meet Mr. Peneku? A. Yes, I did.

Q. Now, at that time you had been going to Minnie for over a year hadn't you? A. Yes.

Q. Why is it that you just decided at that time that you wanted to meet Mr. Peneku?

A. Because the first time I did ask Minnie what his attitude was toward me, as a friend——

Q. Well, you had seen him before, hadn't you, Mr. Kong?

A. Yes, I had seen him when I went over there to either pick the children or drop the children.

Q. When was it that you first found out that Mr. Peneku was on that jury in the Smith Act case?

(Testimony of Stephen Kong, Jr.)

A. I didn't find out.

Q. You didn't find out?

A. No, I never know he was on.

Q. Never know for how long?

A. I never know until I was called into here.

Q. Into this case? [88] A. Into this case.

Q. That you didn't know that he was on that Smith Act jury? A. No, I didn't know.

Q. Well, don't you remember some conversation there at the house about the Smith Act jury?

A. Which house?

Q. At Mr. Peneku's house.

A. They were talking, she was talking, the Mrs. was talking about the Smith Act.

Q. But he wasn't? A. He wasn't talking.

Q. And you say that you didn't know at that time nor never did know until you came into court that Mr. Peneku was on that jury?

A. I knew Mr. Peneku—I mean, well, at the time when she was there talking because she told me that her husband was on the jury.

Q. What time was that?

A. That was when we got there, in the evening.

Q. This same Saturday we are talking about, November 8th?

A. Yes, that is when the Mrs. said that her husband is on the jury.

Q. Now, you did know it on that day, then, that he was [89] on the jury?

A. Yes, at the time, that evening.

Q. Now, you and Minnie, then, went on over to

(Testimony of Stephen Kong, Jr.)

Peneku's house? A. Yes, we went over.

Q. About what time?

A. Late in the evening. I wouldn't recall what time.

Q. And who was there, if you remember?

A. Mrs. Peneku, Peneku, Minnie, myself, her grandfather, and later on the daughter-in-law, Mr. Peneku's daughter-in-law.

Q. Did you all drink beer? Did all of you drink beer? A. No.

Q. How much beer did you take with you that time? A. Six cans.

Q. Who drank the beer, if you remember?

A. Minnie, her grandfather, the daughter-in-law, and myself.

Q. Did Mrs. Peneku drink any?

A. No; didn't care for any.

Q. Now, where was Mr. Peneku? Was he on the punee?

A. What's that? Yes, he was on the punee.

Q. And the rest of you were sitting around the table?

A. Yes, we were sitting around the table.

Q. Now, what did you talk about when you were sitting [90] around the table, Mr. Kong?

A. Talking—Mrs. Peneku was talking about her pheasant lei.

Q. Did you say anything about you going over to Maui to paint your mother's house?

A. Yes, I talked about going over and painting her house.

(Testimony of Stephen Kong, Jr.)

The Court: Louder.

Q. (By Mr. Richardson): Do you remember saying anything about Mrs. Bouslog at that time?

A. Yes, the first time I ever mentioned her name after that conversation.

Q. What did you say as best as you can recall?

A. Well, Mrs. Peneku asked me who my mother's attorney was, so I told her that I heard from my sister that she is having Harriet Bouslog.

Q. Did you say anything to the effect that she was friend of yours? A. No, I didn't say that.

Q. Didn't say that? Mrs. Peneku did say that she would like to be on the jury? I think you said that? A. Yes.

Q. And did she say if she were on the jury she would vote people guilty?

A. Yes, she said she would vote all guilty. [91]

Q. And what did you say to that?

A. I just said that it is not nice to talk about things like that.

Q. Now, where was Mr. Peneku all during the time that conversation was going on?

A. He was lying on the punee.

Q. Was he reading?

A. Yes, he was reading.

Q. Now, when was it, Mr. Kong, that you decided you wanted to have a talk with Mr. Peneku?

A. Well, just then I was going to ask I want to talk to him.

Q. Did you tell him you wanted to talk to him privately?

(Testimony of Stephen Kong, Jr.)

A. Yes, I told him that if he don't mind I want to talk to him about me and Minnie and about the family——

Q. Well, why was it you thought that had to be a private conversation, Mr. Kong?

A. Because I never liked her grandfather to know that I am going to talk about Minnie and myself.

Q. How was that again?

A. I didn't like to converse affairs between me and Minnie in front of her grandfather.

Q. You didn't like to talk about you and Minnie in front of her grandfather? A. Yes. [92]

Q. Why?

A. So I said I would like to talk to him.

Q. Well, the grandfather knew that Minnie and you were going together, didn't he? A. Yes.

Q. Well, why did you object to talking about you and Minnie in front of the grandfather?

A. Well, his attitude towards me which I feel wasn't polite to discuss in front of the grandfather.

Q. You mean, Mr. Kong, you mean Mr. Peneku's attitude toward you? A. Yes.

Q. Is that why you didn't want to discuss?

A. Yes. In other words, when I came into the house I was formally introduced to him and he don't respond to it. So I thought, well, I should apologize even though I be there, I should apologize for coming over to the house, because the way he acted just like I wasn't welcome in the house.

Q. I can't understand you. The way he acted?

(Testimony of Stephen Kong, Jr.)

A. The way he acted.

Q. What was it you said after that?

A. That I wasn't welcome to the house.

Q. So you felt you had to talk to him about things?

A. Well, I apologized for being there.

Q. And you took him into this back room to apologize? [93]

A. I seen him on the side, that I want to talk to him privately about family affairs.

Q. And you got him back there and you apologized, is that right?

A. I told him I would like to be friends with him and I have been trying to and at times when I come there I consider him and he goes ahead and he tells me that he don't want to be friendly, and, I mean, he don't care to meet me. So I asked him why. I say, it is on account of Minnie and this and that? I am sorry I came over to the house.

Q. Then it was an apology that you didn't want the grandfather to hear, is that right?

Mr. Soares: We object to that as argument, if the Court please.

The Court: Overruled.

Mr. Richardson: Can you answer that, Mr. Kong?

A. Well, apologize, I apologized to him.

Q. (By Mr. Richardson): You apologized to Mr. Peneku? A. Because his attitude.

Q. Yes, but that is what you did? You apologized to him?

(Testimony of Stephen Kong, Jr.)

A. Told him I am sorry I came over to the house.

Q. And you didn't want the grandfather to hear you apologize to Mr. Peneku?

A. Yes, and tell him what I think about him and he [94] should—well, his attitude. The first moment I came into the house. And prior to that a few times I have been there, I nodded at him and this or that.

Q. Was Mr. Peneku mad when he came out of the room?

A. After we were talking about the family, this and that, I say, if that is why you want me over to your house, I will be too glad to go out of your house.

Q. Was Mr. Peneku mad when he came out of that room there? A. He wasn't mad.

Q. Did he look like he was mad?

A. I don't know his looks, if he is mad or not mad.

Q. You say he was not mad?

A. To me, he wasn't mad.

Q. Well, what was he to you?

A. He wasn't mad.

Q. He was not mad? A. No.

Q. Now, when you were back there in the room, did you say anything about asking him to do you a favor? A. I did not.

Q. You didn't say that? Did you say anything to him about voting not guilty in the Smith Act case? A. I did not.

Q. You did not? You didn't say anything to him

(Testimony of Stephen Kong, Jr.)

about [95] being broke and not having any money?

A. I did not.

Q. Now, Mr. Kong, you were interviewed by the Federal Bureau of Investigation about this case, weren't you? A. Yes, I was interviewed, yes.

Q. Do you remember when two agents of the bureau came down to see you?

A. In the fire station, yes.

Q. And you told them that you just didn't want to discuss the thing at all, didn't you?

A. I told them that——

Mr. Soares: Just a minute. I object to that as incompetent, irrelevant and immaterial. If counsel wants to show prior contradictory statements, that is another thing. It can be done under the statute in another way. But not for him to be putting questions at this time which we submit are improper.

Mr. Richardson: I am not trying to show prior contradictory statements.

The Court: Well, the fact that he indicated that he didn't want to speak to the F.B.I. is not relevant.

Mr. Richardson: That is no prior contradictory statement. I just wanted to show his actions at that time.

The Court: The objection is good.

Mr. Richardson: All right. [96]

Q. (By Mr. Richardson): Just one minute, sir. Mr. Kong, after this conversation with Mr. Peneku, you and Minnie left immediately, did you?

A. Yes, we left.

(Testimony of Stephen Kong, Jr.)

Q. And where did you go?

A. Went over to the Lillie Gohier's place.

Q. That is where you had been that afternoon?

A. Yes.

Q. Now, did Minnie ask you after you left Peneku's house, ask you what you had said to Mr. Peneku back in the room?

A. I don't recall if she asked me or not.

Q. Well, after you got back to Miss Lillian Gohier's house, didn't she ask you what you had said to him in the bedroom?

A. I don't recall asking me that.

Q. You don't recall that?

The Court: Said to whom?

Mr. Richardson: To her uncle. That is, to Mr. Peneku.

Q. (By Mr. Richardson): Didn't she ask you what you all had said back there?

A. I don't recall Minnie asking me that.

Q. Well, do you recall telling Minnie that if anybody asked her if you went into her bedroom for her to say she [97] didn't know?

A. I don't recall telling her that.

Q. You don't recall that at all? Mr. Kong, do you have a sister that is married to a man named Epstein?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial and not proper cross-examination. It doesn't tend to prove or disprove any of the issues.

The Court: What is the purpose?

(Testimony of Stephen Kong, Jr.)

Mr. Richardson: Well, if your Honor please, just a matter of going into his background.

Mr. Soares: We object to it as being stated in the hearing and presence, if the Court please——

The Court: Do you have a purpose? You can come to the bench and disclose it.

Mr. Richardson: May we do that?

(The following occurred at the bench between Court and Counsel.)

Mr. Richardson: I was going to ask if her sister is married to Epstein, who is a member of the Communist Party. And if he is going to admit it. I don't know. That was the purpose.

Mr. Soares: Isn't that the worst kind of prejudicial testimony? It has nothing to do with this case at all.

The Court: The only relevancy it might have would [98] be in the area of some kind of motive. But just standing alone——

Mr. Richardson: I realize that.

The Court: I will sustain the objection.

Mr. Richardson: All right.

(The conference at the bench ended at this point.)

The Court: The objection is sustained.

Q. (By Mr. Richardson): Mr. Kong, you say you didn't know that Mr. Peneku was on the jury until Mrs. Peneku said something about it there that night when you were sitting around the table?

A. That's right.

(Testimony of Stephen Kong, Jr.)

Q. Don't you recall that you asked Minnie that morning, that you said, "Hey, your uncle is on the jury"? And she said, "Yes." Do you remember that? A. I don't recall that.

Q. You deny that?

A. I don't recall asking her.

Q. Well, do you deny that it happened?

A. I don't recall asking her that.

Mr. Richardson: I think that's all.

Mr. Soares: No questions.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Soares: The defendant rests. [99]

The Court: Rebuttal?

Mr. Richardson: If your Honor please, there may be. Just one second.

(Mr. Richardson and F.B.I. agent confer.)

Mr. Richardson: Minnie Gohier. It is Minnie Kong, I suppose.

The Court: Very well.

MINNIE KONG

a rebuttal witness, on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: Will you state your name?

The Witness: Minnie Kong.

The Court: You are the wife of the defendant?

The Witness: Yes.

(Testimony of Minnie Kong.)

The Court: You are over 21?

The Witness: Yes.

The Court: Where do you live?

The Witness: Kahaluu.

The Court: On this island?

The Witness: Yes.

The Court: Are you employed?

The Witness: No.

The Court: Are you a citizen of the United States?

The Witness: Yes.

The Court: Only? [100]

The Witness: Yes.

The Court: Take the witness.

Q. (By Mr. Richardson): Mrs. Kong, when did you and Mr. Kong get married?

A. Wednesday, the 12th.

Q. That is this past Wednesday? A. Yes.

Q. And, Mrs. Kong, do you remember the day in November of 1952 on Saturday when you and your present husband, Mr. Kong, went down to Mr. Peneku's house? A. Yes.

Q. On that day, November 8, 1952, did you have breakfast with Mr. Kong at Mr. Peneku's house on that day? A. I did.

Q. And then later on you all left, didn't you, with Mr. Kong, you left Peneku, that is, after breakfast, sometime after breakfast you and Mr. Kong left, is that right?

A. I don't remember.

(Testimony of Minnie Kong.)

Q. Well, how long did you stay there after breakfast? How long did you stay?

A. Well, after breakfast I stayed around a little while.

Q. You did? A. Yes.

Q. Did Mr. Kong leave?

A. Yes, he left. [101]

Q. And you stayed? Well, did Mr. Kong call you about 1:30 that day? A. Yes.

Q. And did you meet him after that?

A. Yes.

Q. Did you all buy a case of beer?

A. Yes.

Q. And you went to Mrs. Lillian Gohier's house?

A. Yes.

Q. Now, Mrs. Kong, do you remember if your husband didn't ask you that afternoon whether or not your husband was on the jury—that is, whether or not your uncle was on the jury? Excuse me.

Mr. Soares: I object to the question as being leading and suggestive and not proper rebuttal and that no foundation has been laid as to what Mr. Kong may have said.

The Court: Overruled.

Q. (By Mr. Richardson): Do you remember if he asked you if your uncle was on the jury?

Mr. Soares: Meaning did Kong ask her?

Mr. Richardson: Yes, if Kong didn't ask you that afternoon whether your uncle was on the jury.

A. I don't remember.

Q. You don't remember that at all?

(Testimony of Minnie Kong.)

A. I don't remember. [102]

Q. You just can't recall, is that it?

A. Yes, I mean I can't recall.

Q. All right. Mrs. Kong, did sometime that afternoon before you went back to Mr. Peneku's house, did the defendant ask you what kind of a guy is your uncle, Sam Peneku? Do you remember that? A. Yes.

Q. And do you remember what you told him?

The Court: Just a minute. You will have to answer instead of shaking your head.

A. Yes. I am sorry.

Q. (By Mr. Richardson): And what did you tell him?

A. Well, I said my uncle is a nice fellow. He is quiet. He minds his own business. He hardly talks.

Q. Now, Mrs. Kong, after you left the Peneku's house that night and started back to Mrs. Lillian Gohier's house, did you ask your husband, Mr. Kong, what he and Mr. Peneku had been talking about when they were back in the bedroom?

A. I can't recall that part.

Q. You can't recall that? Do you recall if you asked him what they were talking about and he told you if anybody asked you if he went to the bedroom to tell them that you did not know? Do you remember that?

A. I can't very well recall that part there.

Q. Mrs. Kong, you gave a statement to the [103] F.B.I., didn't you? A. I did.

Q. Do you remember when you gave it? You

(Testimony of Minnie Kong.)

remember the time, the incident in which you gave it? Mrs. Kong, I will hand you a document consisting of five pages, and ask you if this is your signature on the bottom (handing a document to the witness)? A. Yes.

Q. That is signed, "Mrs. Minnie Gohier"?

A. Yes.

The Court: What is the answer?

The Witness: Yes.

Q. (By Mr. Richardson): And that is your signature? A. Yes.

Q. And you remember giving this statement to the F.B.I.? A. Yes——

Q. Officers, do you not? A. Yes.

Q. Was this statement true at the time you gave it, Mrs. Kong? A. Yes.

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, if the Court please.

The Court: Overruled. [104]

Mr. Richardson: If your Honor please, I would like to show it to her for the purpose of refreshing her recollection.

Q. (By Mr. Richardson): Now, will you take the statement there, Mrs. Kong and read it?

The Court: To herself?

Mr. Richardson: Yes, sir.

Q. (By Mr. Richardson): Now, Mrs. Kong, do you now recall? A. Yes, I do.

Q. Whether or not Mr. Kong asked you that night—I beg your pardon. I will withdraw that. Do you now recall whether you asked Mr. Kong that

(Testimony of Minnie Kong.)

night what he and your uncle were talking about in the bedroom? A. Yes.

Q. What did he tell you?

A. He said it was nothing.

Q. Did he further tell you that if anybody asked you about that, being in the bedroom, for you to say that you did not know?

Mr. Soares: We object to that as leading and suggestive, if the Court please.

The Court: It is, but the objection is overruled under these circumstances. Read the question to the witness.

(The reporter read the question.) [105]

A. I don't recall that.

Mr. Soares: What was the answer?

(The reporter read the last answer.)

Q. (By Mr. Richardson): Mrs. Kong, will you look at the paragraph on page 5 of this instrument —don't read it out loud, but read the words starting with this sentence (indicating). See if you now recall whether that happened?

A. Oh, he told me, when I asked him what did you talk to my uncle about, he said, oh, just forget about what I said to him in the room.

Q. Didn't he tell you, Mrs. Kong, if they ask whether I went into the bedroom, tell them you did not? Do you remember that? A. Yes.

The Court: Wait a minute. What does that "yes" mean?

Q. (By Mr. Richardson): That is correct, then? He did tell you that?

(Testimony of Minnie Kong.)

A. Yes, because I asked him what did he go into the bedroom for, and he said, "Forget about the bedroom."

Q. And did he tell you if they ask whether I went into the bedroom, tell them you did not know? Did he tell you that? A. Yes.

Q. He did tell you that? [106] A. Yes.

Q. Now, Mrs. Kong, also do you now recall, after looking at the statement, whether or not Mr. Kong asked you that morning, the morning of November 8, whether or not your uncle was on the jury?

A. You mean when he called in the morning time?

Q. Well, I don't know when he did ask you, but did he ask you that morning at some time whether or not your uncle was on the jury?

A. Yes, he asked.

Q. And did you tell him "Yes"?

A. That is what I said, yes.

Q. You told him that morning that your uncle was on the jury? A. Yes.

Q. That is, you told Mr. Kong? A. Yes.

Mr. Soares: May I see that?

(Mr. Richardson hands document to Mr. Soares.)

Mr. Richardson: I think that's all.

The Court: Very well. Cross-examination?

Cross-Examination

By Mr. Soares:

Q. With reference to this statement——

(Testimony of Minnie Kong.)

The Court: Excuse me. It is almost 3:00 [107] o'clock. We will take a recess. Then you can cross-examine.

(A recess was taken at 2:58 p.m.)

After Recess

The Court: Note the presence of the jury and of the defendant together with counsel. You may cross-examine.

Q. (By Mr. Soares): This statement which Mr. Richardson showed you, in whose handwriting is it? A. That is my handwriting.

Q. All of it? A. Yes.

Q. Did you have anything to copy from?

A. No.

Q. Did anybody tell you what to put in there of anything?

A. Well, there is a little paragraph down at the bottom that Mr. Albrecht——

Q. Is that in your handwriting?

A. Yes, that is in my handwriting.

Q. You write differently. Sometimes vertical and sometimes slant, do you?

A. I write about the same all the time.

Q. And the first paragraph, did you put that in there or did they tell you to put that in?

A. No, they put that in.

Q. They put it? [108]

A. You mean the above on the sheet there, the beginning of the paper?

Q. Yes, the very beginning.

(Testimony of Minnie Kong.)

A. Oh, they put that there.

The Court: Do you want to look at what you are talking about? You can if you wish.

Mr. Soares: If there is any question about it.

The Court: If she would look at the statement——

Q. (By Mr. Soares): This first paragraph, is that your language or did they tell you to write that? A. No, that is their language.

The Court: But it is in your handwriting?

The Witness: No, this here isn't my handwriting. I just signed the last page here.

The Court: Well, you first said the entire statement, as I understood you, was in your handwriting.

The Witness: No, I thought he was talking about this statement at the bottom here.

The Court: Clear that up.

Q. (By Mr. Soares): In other words, Mrs. Kong, the only thing that is in your handwriting is the signature at the bottom of each page and four lines, before your signature on the last one?

A. Yes.

Q. Do you remember that when you left your sister's [109] to go to your aunt's, to your Aunt Emma's——

The Court: Wait a minute. This is a new one.

Mr. Soares: Pardon?

The Court: This is a new one.

Mr. Soares: Well, I am putting my question.

The Witness: My sister-in-law.

Mr. Soares: I see.

(Testimony of Minnie Kong.)

Q. (By Mr. Soares): When you left your sister-in-law, Lillian's? A. Yes.

Q. To go to your Aunt Emma's, that is when Stephen said he would, too, and you did not want him to go?

A. Yes, because I was just going to run down there to pick up some rolls just for a little short time.

Q. And——

The Court: Just a minute. I am lost. Who is Auna Emma?

Mr. Soares: Mrs. Peneku.

The Witness: Mrs. Peneku.

Q. (By Mr. Soares): That's right, isn't it?

A. Yes, Mrs. Peneku.

Q. And you told the F.B.I. people that you did not want Steve to go with you because your folks did not like Steve? That is true, isn't it?

A. Yes, in a way, because I was just going to go down [110] there just for about five minutes.

Q. And it is true that you knew your folks, meaning Mr. and Mrs. Peneku, did not like Steve?

A. Yes.

Q. And when you asked Kong what was said in the room, you thought that he had gone in there to talk about you, did you not?

Mr. Richardson: I object to that, if your Honor please. Mr. Soares is telling her what she thought.

Mr. Soares: Well, I will reframe it.

Q. (By Mr. Soares): When you asked Kong what they had talked about in the room, you told

(Testimony of Minnie Kong.)

the F.B.I. that you thought that he was talking about you?

Mr. Richardson: I still object to that question, if your Honor please.

The Court: Sustained.

The Witness: Well, I was wondering——

The Court: Just a minute.

Mr. Soares: I don't want to transgress the Court's ruling, but I would like to put the question this way:

Q. Did you tell the F.B.I. that you thought Kong had gone into the room to talk about you?

A. Yes.

Q. Just a minute. Let the Court rule.

The Court: All right. [111]

Q. (By Mr. Soares): And did you really think so?

Mr. Richardson: I object to that.

Q. (By Mr. Soares): Was that true?

A. Yes.

Q. Now, Mrs. Kong, when Mr. Richardson showed you this statement in order to refresh your recollection, he had asked you whether it was true that Kong had said that, if anybody asked you whether you went into the room to say you did not know? Now——

The Court: I don't think you have that quite right.

Mr. Soares: I am subject to being corrected.

The Court: As you have it worded, it is that she

(Testimony of Minnie Kong.)

went into the room. I don't think she meant that.

Mr. Soares: What I meant was—well, I will reframe it.

Q. (By Mr. Soares): When Mr. Richardson showed you this paper, in order to refresh your recollection, you having said that you did not recall whether Kong had told you that if anybody asked you if you went into the room to say that you did not know, and your attention was directed, was it not——

The Court: Excuse me. You made the same mistake again.

Mr. Soares: Did I say "she"?

Q. (By Mr. Soares): Whether Kong went into the room, to say [112] you did not know? And you said you don't recall. Your attention was directed, was it not, to this language, "If they ask whether I went into the room, tell them you did not know"? That is what Mr. Richardson pointed to, wasn't it, in that connection?

A. I don't remember—no. This morning he didn't go over that part there.

Q. I understand.

A. He just asked me if the things I said do I remember.

Q. That's right, and he asked you to remember—you remember Mr. Richardson asked you whether Mr. Kong had not told you that if anybody asked you about Kong going into the room to say you did not know? And your first answer was, "I do not

(Testimony of Minnie Kong.)

recall." Then Mr. Richardson showed you this paper and I got the impression that he directed your attention to certain language in the paper. Now, I am trying to find out——

The Court: On page 5.

Q. (Continuing): ——on page 5—yes—trying to find out if that language is not the language which reads, "Steve said if they ask whether I went into the bedroom tell them you did not know." That is what refreshed your recollection, was it not?

A. Yes.

Mr. Soares: No further questions. [113]

Mr. Richardson: No further questions.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Richardson: We have nothing further for rebuttal.

The Court: Surrebuttal?

Mr. Soares: No surrebuttal.

The Court: Very well. The evidence is concluded. Do you have your requested instructions ready?

Mr. Soares: Not mine.

Mr. Richardson: I will only have one. I have it here.

The Court: Do you have any special ones?

Mr. Soares: Pardon me?

The Court: Do you have any special ones?

Mr. Soares: Well, I did want to make some requests, particularly with reference to the definitions

of language used in the indictment over and above the usual ones, the so-called stock instructions, which is an improper term.

The Court: I don't recall any peculiar words. Well, I want to know whether or not the ladies and gentlemen of the jury wish to stay and conclude this case today, whether they want to come back tomorrow morning and finish it, and the finishing touches take on the matter of arguments by counsel and instructions by the Court. It is a matter of probably two [114] to three hours before the case will be in your hands. Or do you want to let it rest until Monday? I am conscious of the fact that some of you come from other islands and it may be that you are anxious, if possible, consistent with your obligations in this case, to get home. So I simply want to know what you would like to do. You may chat among yourselves on the time factor and see what the concensus of opinion is. Is it tonight, tomorrow or Monday?

(After a short discussion, the jurors agreed on Monday.)

The Court: Monday. All right. Very well, then. I will have the jury report at 10:00 o'clock on Monday and I will have the lawyers report to me on that morning at the hour of 8:30 together with their requested instructions. I will advise them, now, as usual, that I have stock instructions at hand and I can't conceive of any particularly voluminous, fancy instructions being needed. So if you will just

bring in, without duplication, the ones you think should be given in addition to the standard instructions, we will make better progress, and we should be through in time for you to get your breath before the jury reports at 10:00, at time you may argue to the jury. Now, this being a week end, I underscore that which I told you earlier, not to discuss this case with anyone, including fellow jurors, not to allow anyone to discuss it in your presence, not to read anything [115] about it or to hear anything said about it over the radio or TV. That, of course, doesn't mean that you can't continue living a normal life. It just means that you must ignore any references to this case, should you accidentally come in contact with them. And I have also indicated to you earlier and underscore again that if anyone in this or any other case should ever attempt to talk to you about it, directly or indirectly, I want you to report that fact to the Court. So until Monday morning for the jurors at the hour of 10, they are excused, and the attorneys until 8:30.

(The Court adjourned at 3:28 p.m.) [116]

August 17, 1953

(The trial resumed at 10:10 a.m.)

The Clerk: Criminal No. 10,704, United States of America, plaintiff, vs. Stephen Kong, defendant, for further trial.

The Court: Note the presence of the jury and of the defendant together with counsel.

Mr. Soares: If the Court please, as indicated in our early session, at this time I should like to make a formal motion in the presence of the jury——

The Court: Yes.

Mr. Soares: ——which is that the prosecution be required to elect on what they are relying for the conviction, as to which of the defenses described in the indictment they rely on conviction as between an endeavor to influence or to obstruct or to impede justice, the same with reference to the juror, Peneku.

The Court: Having discussed this matter with you when the jury was not present and the client was not present, I indicated to you what my ruling would be when these people were present. And, therefore, I will at this time announce that your motion is denied. There is no cause for an election as the indictment is not duplicitous.

Mr. Soares: I would like, then, to move for a [117] judgment of acquittal on each of the grounds heretofore laid in the motion to dismiss the indictment and with reference to the indictment itself that it is insufficient in that it merely charges the defendant did endeavor to influence the due administration of justice, whereas it does not allege that he did so corruptly; that it does not indicate the matter in which the due administration of justice was attempted to be interfered with and it is not clear from the indictment whether the charge is an endeavor to influence the juror or the due administration of justice or both. Further, that

there is no evidence, at least no evidence amounting to more than a mere scintilla of an endeavor that the defendant acted corruptly and no evidence of motive.

The Court: Likewise upon each of the grounds urged, the motion for judgment of acquittal is denied. Very well.

At this time, the evidence being concluded, the attorneys may present to the jury argument designed to be helpful to the jury in evaluating the evidence which they have heard, and with the general understanding of what the applicable will be when given to you by the Court's instructions. Bear in mind that the argument of counsel is not evidence but is merely an evaluation from the standpoint of the respective attorneys' clients, as to how they think the evidence should be evaluated by you. Should they make any reference to rules of law which I do not recommend that they [118] do other than generally, bear in mind that the law you will take from the Court later and not from the attorneys. The parties having the burden of proof, the government, have the privilege of presenting an opening argument and a rebuttal argument. Therefore, it may be heard twice. The defendant, having no burden, simply present an argument following the government's opening argument. At this time, Mr. Richardson, you may present your opening argument.

(Mr. Richardson presented the opening argument on behalf of the plaintiff.)

(Mr. Soares presented the argument on behalf of the defendant.)

The Court: We will take a short recess.

(A recess was taken at 10:55 a.m.)

After Recess

The Court: Note the presence of the jury and of the defendant together with counsel. You may conclude with your argument, Mr. Richardson.

(Mr. Richardson presented the closing argument on behalf of the plaintiff.)

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, to refresh your recollection of exactly what it is you have to decide, let me reread to you the indictment, stressing, as I [119] do, that it is, as I have told you, a mere specification of the charge of that which the government undertakes to prove beyond a reasonable doubt, and is in no way to be deemed by you as evidence. But it is charged and the government has undertaken to argue that it has proven by the evidence introduced, that the defendant denies:

"That on or about November 8, 1952, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Stephen Kong, Jr., did endeavor to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, unlawfully, feloniously and

corruptly endeavor to influence, intimidate and impede Samson Nani Peneku, the said Samson Nani Peneku being then and there a trial juror duly impanelled and sworn in the case of United States vs. Charles Fujimoto, et al., Criminal No. 10,495, pending in the United States District Court for the Territory of Hawaii, in violation of Section 1503, Title 18, United States Code."

Now, insofar as we are here concerned, the statute upon which this charge is predicated is to be found in Title 18 of the U. S. Code, Section 1503. It is a statute designed to protect the due administration of justice in the federal courts, in the federal area. And the particular clause upon which this prosecution is predicated is that part of the statute which reads: [120]

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct and impede the due administration of justice * * *"

Shall be punished.

Now, it is here charged in this indictment that this defendant did unlawfully endeavor to influence, obstruct and impede the due administration of justice by attempting to intimidate, influence and impede Samson N. Peneku in the discharge of his duty as a juror in a certain case then pending in the federal court, and in this particular federal court. So that is the issue you have to try, as to whether or not this defendant beyond all reasonable doubt

did an act of the type described here in an endeavor to impede the administration of justice and that he did that act with a criminal intent.

I have to give you at this time a number of general instructions that are applicable to nearly every criminal case, and though many of you may be familiar with them by virtue of having heard them referred to in other cases, it is this case in which they must be given anew because in this case it is the defendant's liberty that is at issue, and consequently I ask for your undivided attention in regard to comprehending and understanding these general instructions.

First of all, as I have told you, you are to take the law from the Court and not from the lawyers. And you are [121] to single out any one specific instruction of mine and give it any undue weight but are to consider the instructions as a whole. Naturally, of course, you are to decide this case solely upon the evidence that has been presented here, and any and all inferences that may reasonably be drawn therefrom.

In evaluating the evidence you are expected to apply thereto your common knowledge and common experience as jurors. To clarify that statement, it is not your experience as jurors that you are to apply, but you are called to serve as jurors because you do have a fund of common knowledge and common experience which you can have recourse to in evaluating the evidence that you have heard, in the exercise of judgment in evaluating the same. But

you still must decide this case solely upon the evidence that you have heard in court.

Now, what is evidence? It consists of two classes, and each kind is recognized and admitted in courts of justice and upon either or both, if adequately convincing, juries may lawfully find an accused guilty of crime. The first class is known as direct evidence and the second class is known as circumstantial evidence.

Direct evidence of the commission of a crime consists of the testimony of every witness who with any of his own physical senses perceived any of the conducts constituting the crime charged, and which testimony relates to that which was perceived. All other evidence admitted in the trial is [122] circumstantial. And so far as it shows any acts, declarations, conditions, or other circumstances tending to prove a crime in question or tending to connect the defendant with the commission of such a crime, may be considered by you in arriving at a verdict.

The law makes no distinction between circumstantial and direct evidence, but respects each for the convincing force it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries a convincing quality required by law, as will be stated in these instructions.

Of course, if during this trial I have done anything or said anything which suggests to you that I am inclined to favor the claims or positions of either party, I want you to disregard the same and

let not the same influence you. I have not expressed nor intended to express nor have I intended to intimate the opinion as to which witnesses were or were not worthy of belief, and which influences are to be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to these matters, I instruct you to disregard it.

At times, during the course of the trial, I have been called upon to make rulings upon objections and to keep the record straight I have occasionally stepped into the situation to make sure that no misleading evidence or any [123] ambiguity is created unnecessarily. But from my rulings and actions, to present to you the evidence clearly and unobstructed, as clearly as possible, you are not to draw any inferences one way or another, for my rulings and my general supervision of the conduct of this trial is not evidence.

You are, of course, not to be concerned with evidence that has been rejected and if there has been, as there has been, some evidence which I have stricken, you are, of course, not to consider the same. It is as though the stricken evidence was not heard by you at all.

You are to bear in mind, too, that it is only the answers to questions that constitute the evidence given by a witness. Unanswered questions, questions that have been ruled on as objectionable and left unanswered are, of course, not either evidence or any basis for any inference.

Of course, there have been times during the trial when counsel have approached the bench to discuss

some matter with me. You are not to feel offended because we didn't take you into our confidence at that time, but we were discussing matters of law to determine whether or not certain things should or should not be heard by you. But you are to be offended for not being included in any of these bench conferences.

I would have, and do have, the right to comment upon the evidence and I may do so in some areas, but I do not [124] presently plan to. But if I do, I want you to bear in mind that I am simply exercising the prerogative of a judge in a federal court, but in no way am I in so doing desirous or attempting to interfere with your exclusive province of determining the credibility of the witnesses and the weight of the evidence, for you and you alone are the exclusive judges of the facts, of the effect and value of the evidence.

Now, what about this matter of credibility? A great deal turns in most cases and in this upon the believability of the witnesses who testify. And, as I have just said, you are the sole judges of the believability of the witnesses and of the weight which is to be given by you to their testimony.

First of all, a witness is presumed to speak the truth. And this presumption, however, is one that may be rebutted by the manner in which the person testifies, by the character of the testimony, or by evidence affecting his reputation for truth, honesty and integrity or his motives or by contradictory evidence.

In testing the credibility of the witnesses in this case, you may believe the whole or any part of the

evidence of any witness or you may disbelieve the whole or any part of it as may be dictated by your exclusive judgment as reasonable persons. You should carefully scrutinize the testimony given and in so doing consider all of the circumstances [125] under which any witness has testified, considering his conduct on the witness stand, his attitude—or hers—and whenever I use the masculine pronoun that includes the female as well—his demeanor, conduct on the witness stand, his intelligence, the relations which he bears to a party, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if any at all, and by every matter that tends reasonably to shed light upon that witness' believability. The witness, of course, may be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial. A witness who is wilfully false in one material part of his testimony is to be distrusted in others. The jury may reject the whole of a testimony of a witness who has wilfully sworn falsely to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with design for the purpose of misleading and deceiving you jurors, then you may treat all of his or her testimony with distrust and suspicion and reject all unless you should be convinced that he or she has in other particulars sworn to the truth.

Nothing turns on the number of witnesses produced by either side, for the testimony of one witness worthy of belief is sufficient for the proof of any fact and would [126] justify a verdict in accordance with such testimony, even though a number of witnesses testified to the contrary if from the whole case, considering the credibility of the witnesses, and after weighing the various factors in evidence, you should believe that there was a balance of probability pointing to the accuracy and honesty of the one witness. Therefore, you are not bound to decide in conformity to the testimony of a number of witnesses which does not produce conviction in your minds as against declarations of a lesser number or a presumption of other evidence which appeals to your minds in more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from the beliefs or prejudice or from a desire to favor one side as against another. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not the relative number of witnesses but the relative convincing force of evidence.

As I told you at the outset in this, as in every criminal case, from the filing of the indictment or accusation no presumption whatsoever arises to indicate the defendant is guilty, or that the defendant has any connection with or responsibility for the

crime charged in the indictment, for the fact is that there is a rule of law that a defendant is presumed to be innocent at all stages of the proceedings [127] until, if ever, the evidence shows such defendant to be guilty as charged beyond a reasonable doubt. This presumption of innocence follows the defendant to the jury room to be weighed by you as evidence along with other evidence.

A defendant does not need to testify. He may remain silent. And no adverse inference may be drawn by the jury from the fact that he elects not to testify. However, he also has a right to testify if he so desires, but when he does so testify his testimony is to be evaluated in the same manner as you evaluate the testimony of any other witness.

If the evidence in this case as to any particular count—and there is only one count here—is susceptible of two constructions or evaluations, much of which appears to be reasonable and one which points to the guilt of a defendant and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt. You will notice that this rule applies only where both of the two possible opposing conclusions appear to your mind to be reasonable, and the other unreasonable, it would be your duty to adhere to the reasonable deduction and reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to the defendant's guilt, the entire proof must carry the convincing

force required by law to support a verdict of [128] guilty.

It goes without saying that the defendant is on trial for only that which is charged in this indictment and for nothing else. You will notice the indictment uses the words "knowingly, wilfully, unlawfully, and feloniously." And it adds one that doesn't ordinarily appear in the average case, namely, "corruptly." Those are all legal words of art. Let me tell you what they mean as they are used here in this connection. When the law charges something with having been knowingly done, it does so for the purpose of insuring that no one should be convicted or could be convicted of a crime because of a mistake or inadvertence or for other innocent reasons. The law punishes only the doing of prohibited acts with a criminal intent. If there is no criminal intent, the act is not in and of itself a crime, under most circumstances, such as here. Thus the word "knowingly" is used here to make sure that you are able to find beyond a reasonable doubt, should you convict, that the defendant knew what he was doing.

"Wilfully." You will find that word likewise means just about what it means in other circumstances, and it does not greatly change its meaning because it is used in a legal connection. However, it does mean in this regard that the government must prove that the act which is prohibited by the statute was not only done, as I have said, knowingly, but wilfully, meaning deliberately with a bad pur-

pose or evil motive or without grounds for believing the act to be lawful. [129]

Now, concerning ignorance of the law. That is commonly said to be no excuse, and that is true. However, ignorance of the law may be relative to the question of whether or not a person acted with a criminal intent.

I have not defined for you the words "feloniously" and "corruptly." Let me do so. "Feloniously" means done with an evil intent, a criminal intent. And so, too, the word "corruptly" as used in this connection. It means that it is done, as I have indicated, with a bad purpose or evil motive, without grounds for believing it to be lawful, with a criminal intent.

Now, what is a criminal intent that these words "knowingly, wilfully, feloniously and corruptly" seemingly add up to? And which I have said must accompany the doing of a prohibited act in order to constitute a crime. How do you recognize this criminal intent? How is it proven? In answering those rhetorical questions, let me say to you that criminal intent may be proven by circumstantial evidence, and it is rarely proved in any other way because, although witnesses may see and hear and thus be able to report correctly that which a defendant does or fails to do, there can be in the nature of things no eye-witness account of the state of a person's mind. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. Intent may be inferred

from all of the evidence in the case, [130] including any acts done and statements made by the accused. The jury should consider all of the facts and circumstances in evidence which may aid the determination of the issue as to intent. In that connection let me say to you that the law also is that a man is intended to presume the natural and probable conditions of his acts, acts which he does knowingly, wilfully, and so forth.

As experienced jurors you know that you are in no way to be concerned with what would happen in the event you should return or did return a verdict of guilty. The matter of prescribing the punishment that would flow from a conviction is exclusively within the power of the Court and is in no way to be considered by you in arriving at your verdict. You are simply judges of the facts and of the credibility of the evidence. And when you have determined the facts and applied the law thereto, you have done your duty and you should not be and must not be concerned with duties that do not come within the scope of your oaths as trial jurors.

Now, in conclusion, let me give you one or two more or less specific charges, and again to orient you I invite your attention to the fact that the overall charge is that the defendant did unlawfully endeavor to influence, obstruct and impede the due administration of justice. What does that mean? It means, as perhaps I have indicated, that there are proper and improper ways of influencing the

administration of [131] justice. And this law that I have referred to as forming the basis of this charge is concerned only with the improper methods of influencing the administration of justice. Let me illustrate it.

Here, for the purpose of properly influencing the administration of justice, you ladies and gentlemen have been sworn as trial jurors and to influence you properly the law has allowed into evidence certain testimony and on the basis thereof, again by way of properly influencing you, the Court in accordance with the tradition and custom has allowed arguments to be presented to you by attorneys. I say that by way of contrasting proper from improper. Now, this charge is, improperly influencing the administration of justice.

Now, the word "endeavor" as used. That word means exactly what you think it means, namely, to attempt, to try. It does not mean that the attempt has to be successful. It might be, but it doesn't have to be. The thing that is declared to be wrong is the attempting, the trying to influence the administration of justice improperly, whether that succeeds or not.

Now, how was it, according to this charge, that the defendant is said to have unlawfully endeavored to impede the due administration of justice? As I mentioned before, it says in that he did endeavor—to paraphrase—he did endeavor to improperly influence a juror in the discharge of his duties [132] as a juror in a certain case described as United

States v. Fujimoto then pending in this court. Whether he did or not is for you to determine from the evidence, to be sure. And if he did so, you must find that he did so with a criminal intent. And, therefore, I tell you that you cannot find the defendant guilty unless you are unanimously agreed and your verdict must be a unanimous one that the defendant corruptly endeavored, that is, with a criminal intent endeavored to influence, obstruct and impede the discharge of Mr. Peneku's duty as a trial juror in the case of United States vs. Fujimoto, Criminal No. 10,495, then pending in this court.

So by way of summarization I will come to the matter of reasonable doubt. The government must prove to your satisfaction beyond a reasonable doubt in this case that the defendant, with a criminal intent, tried to influence, obstruct and impede the due administration of justice by trying corruptly to influence, intimidate and impede the juror Peneku in the discharge of his duties as a juror in the case of United States vs. Fujimoto. If you do not find that those elements have been proven to your satisfaction beyond a reasonable doubt, you must then acquit. If you do find that they have been proven beyond a reasonable doubt to the satisfaction of each of you jurors, then your duty is under your oath to convict.

You will notice that I have said nothing about motive. Motive may be relevant but it is not an essential element of [133] intent. It may help to

establish intent. The lack of it may throw some light on whether or not there was any criminal intent at all. But in and of itself, motive is not an essential element.

And now, in conclusion, regarding these elements that I have said must be proven to entitle the government to a verdict of guilty, proven beyond a reasonable doubt, I will define for you what is meant by a reasonable doubt. Perhaps some of you could recite it from memory. But whether you could or not, listen to it again carefully because it is the key instruction here, for it describes the government's burden or proof which obtains in this and every criminal case. When we say that the government must prove its case beyond a reasonable doubt in order to be entitled to a verdict of guilty, we mean that a reasonable doubt is just such a doubt as the term implies. It is a doubt for which you can give a reason. But this reason must not arise from any merciful disposition or from any kindly, sympathetic feeling or from any desire to avoid performing a possibly disagreeable duty. The doubt, in order to come within this definition of a reasonable doubt, must be substantial doubt, such as an honest, sensible, fair-minded person might with reason entertain consistently with a conscientious desire to ascertain the truth and to perform a duty. It is such a doubt as would cause a person of ordinary prudence, sensibility and decision, in determining an issue of [134] great concern to himself to cause him to pause or hesitate in arriving at his

conclusion. It is, therefore, a doubt which may be created by the lack of evidence or it may be created by the evidence itself. But under no circumstance can a reasonable doubt be equated with a speculative, imaginary, or conjectural doubt.

When we say that the government must prove its case beyond a reasonable doubt, we do not mean that the government must prove guilt to a metaphysical certainty or proof positive. In human experience that is usually impossible. In any event, the law simply requires the government to prove a case to the point of being beyond any and all reasonable doubt. That means, as I have described to you, proof in accordance with the definition that I have given you which expressed otherwise means that a juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged.

And with that I conclude the instructions simply by saying that two forms of verdict will be given to you for your use. Use the form that meets and is in conformity with the verdict that you reach. And have your foreman sign the form that you use and notify the Court that you have arrived at a verdict. The Court will convene to receive the same. You may take the evidence to the jury room and you may take the indictment, although I don't think there is any tangible evidence in this case. [135]

The Clerk: No, your Honor.

The Court: In fact, there is none. And the indictment is not evidence, but you may take the speci-

fications of the charge with you to the jury room if you wish. And at this time, in accordance with rule and custom, if you will just step outside for a moment I will find out from the attorneys what it is that they think I might better say to you or say in addition to you, to be helpful to you. So if you will just step outside for a moment, I will do so.

(Jury leaves court room at 11:50 a.m.)

The Court: The jury is now absent from the court room and I will hear from the attorneys as to things that they think I have omitted or said improperly. Is there anything you wish to say that may come within the category of an exception?

Mr. Soares: I am not going over any of the things that we have heretofore objected to, but it did strike me that there wasn't sufficient reference to the provision of the statute that the endeavor must be a corrupt endeavor, unless I misunderstood your Honor. Even in reading the statute the Court did not include the reference, did not use the word "corrupt."

The Court: I do recall referring to the word "corrupt" twice, Mr. Soares, but I will be happy to clear it [136] for you if you have any doubt.

Mr. Soares: It is true that in summarizing your Honor did use that word, but I am particularly complaining about when the Court was quoting from the statute the Court stated, the Court started all right and began to read the first of those two last phrases and you did say, "whoever corruptly," and so on does the thing. Then when you came to

the instruction indicating that the reference was not to the accomplishment of the endeavor, but the endeavor itself, you did not, if I recall correctly, include the word "corrupt," which your Honor said during the course of the argument earlier qualified the word "endeavor."

And then again with reference to Peneku, the reference I think your Honor used was the word "improperly" rather than the word "corruptly."

The Court: I was paraphrasing the statute there, I think, in trying to compare a proper influencing with an improper influencing or unlawful.

Mr. Soares: I have reference to an earlier reference by the Court. In reading from the statute, your Honor said that simply by attempting to intimidate Peneku, intimidating but did not say by corrupting, attempting to or endeavoring to.

The Court: All right. I will be happy to make that clear when they come back. If you would like them back now——

Mr. Richardson: There is nothing for us. [137]

(Jury returns to court room at 11:53 a.m.)

The Court: The record may reflect the presence at this time of the jury and of the defendant together with counsel.

It has been suggested, ladies and gentlemen of the jury, that perhaps I haven't been as clear as I might have been and, therefore, with respect to a certain area that I have in mind I will try to repeat, being clearer than perhaps I have been in the past. I refer to the statute, 18 U. S. C. Section

1503. Nowhere does the statute use the words "knowingly, wilfully, unlawfully, and feloniously." But it uses the words "corruptly" which as used implies those words, "knowingly, wilfully, unlawfully and feloniously," meaning that the acts that are set forth in the statute as prohibited acts to constitute a violation must be acts done with a criminal intent. And, therefore, the statute says in this connection, with reference to the charge laid in this indictment, which is laid under the final clause and supplying the words "whoever" which is the very first word in the statute, it says here, "Whoever corruptly influences, obstructs, or impedes or endeavors * * *" and at that point the word "corruptly" is to be understood as repeated, "or whoever corruptly endeavors to influence, obstruct or impede the due administration of justice * * *"—shall be punished. So that with reference to this concept of "corrupt" or "corruptly" whenever you find it used in the [138] indictment you are to understand thereby that even though the statute doesn't use the words "unlawfully, knowingly, wilfully or feloniously" that the concept of "corruptly" means that they are to be inferred for the word "corruptly" to repeat, means as used here that the act done must have been done with a criminal intent.

Very well. Anything further?

Mr. Soares: I think we can dispose of this if we come to the bench.

The Court: All right.

(The following occurred at the bench between Court and counsel:)

Mr. Soares: Again your Honor's last statement says, whenever in the indictment the word "corruptly" is used and is not used with reference to the charge that the defendant corruptly endeavored—that is the point I tried to make out there. It seems to me they should be told that if it isn't there it belongs there.

The Court: Belongs where?

Mr. Soares: In the charge, corruptly endeavors to influence. They haven't said that in the indictment.

The Court: Oh, yes, they did.

Mr. Soares: That is the big point I was trying to make.

The Court: Where is the indictment, Mr. [139] Clerk?

Mr. Soares: To impede Peneku and not the administration of justice.

The Court. And corruptly.

Mr. Soares: Endeavor to influence, intimidate Peneku. But not corruptly endeavor to impede the administration of justice.

The Court: Oh, I see what you mean. All right.

Mr. Richardson: Hadn't your Honor covered that?

Mr. Soares: It belongs there. And that is the one reason we complained about the indictment, because it isn't there.

The Court: All right. I get you.

(The conference at the bench ended at this point.)

The Court: Without changing anything that I have said to you with respect to this word "corruptly," it has been brought to my attention that in the third line of this indictment it says that the defendant did endeavor to influence, obstruct and impede the due administration of justice. Then it goes on in that he did thus and so. Now, with respect to the charging part, that he did endeavor to influence and obstruct and impede the due administration of justice, by way of interpreting the charge you have to drop down to the bottom where it says in violation of Section 1503 and that charge implies that he did it corruptly as the statute alleges, as the nature of the offense, which in turn means he did it with [140] a criminal intent. So that you are to understand the charge to be that the defendant did corruptly, that is, did with a criminal intent knowingly, wilfully, unlawfully and feloniously endeavor to influence, obstruct and impede the due administration of justice by doing thus and so. And, of course, "so" refers to the words used that follow the phrase "in that he did," so and so. Very well. Does that clear up the point?

Mr. Soares: Well, that meets the point, let us say.

The Court: All right. Now, the bailiff and matron will step forward and be sworn to take charge of the jury.

(Mr. Harry Tanaka and Mrs. Lily L. M. Deering were sworn to take charge of the jury.)

The Court: Very well. Your first order of busi-

ness, ladies and gentlemen of the jury, when you reach the jury room and close the door will be to select one of your number to function as foreman. Your second order of business would be to prepare to go to lunch. The third order of business will be to come back from lunch and then for the first time to close the door again and discuss this case and evaluate the evidence and apply the court's instructions to the facts as you find them to be, until you arrive at a verdict. After you reach a verdict, you will simply notify the Court to that effect and the Court will convene to receive your verdict. And until that time the Court will stand at recess in this case. The jury will go with the bailiff and [141] matron.

(The jury retired to deliberate the case at 12 o'clock noon.)

(The jury returned to the court room for further instructions at 5:17 p.m.)

The Court: Note the presence of the jury and of the defendant together with counsel. I am advised by the Clerk that I have a message from the jury which reads as follows; addressed to me:

"Your Honor, we, the jury, respectfully request a copy of your instructions as to the meaning of the words 'knowingly, wilfully, unlawfully, feloniously and corruptly,' as used in the indictment. Also clarify the meaning of 'criminal intent.'

"Respectfully, Samuel L. Chastain, Foreman."

Very well. I will comply with a part of your requests, but I cannot comply with the request for

a copy of the Court's instructions because I do not have copies to give to you and it is not my custom to give them even if they did exist. And, further, the mechanics of making copies of what I actually said are such that you would probably be detained unnecessarily long. So rather than comply with that portion of your request, I will go over this matter of criminal intent with you once again.

First of all you probably would wish to tell me that the law should be that you should not have jury trials during [142] kona weather. But be that as it may, we are in the midst of a trial, despite the unpleasantness of the weather and we will have to give our serious attention to what is the scope, the content and meaning of this term "criminal intent." I explained to you this morning that the law has classified crimes. There are some crimes that require no criminal intent. And there are some crimes that require a general criminal intent. And there are other crimes that require a specific criminal intent. The type of crimes that require no criminal intent are best illustrated by traffic offenses. If you go through a red light, whether you intended to or not the fact that you did the act of going through the red light constitutes the offense. That is called a mala prohibita type of crime. We are not concerned with that. The crime that is charged in this indictment is not that kind.

At the other extreme we have crimes that require what I have called a specific intent. For example, murder is an illustration. The charge or crime of murder requires a specific intent, a specific intent to

kill a human being. We are not concerned with that type of crime.

We are concerned with the middle class, the class within which falls most of the statutory offenses, namely, crimes that require the proof by the government of a general criminal intent or, as we lawyers call it, mens rea, a guilty mind. [143]

Now, I also explained to you this morning that the law in this category does not make the doing of a prohibited act a crime unless it is done with a criminal intent. And that is why the indictment talks about doing something knowingly, wilfully, feloniously and—may I see the indictment, Mr. Clerk? There may be another word there—unlawfully and corruptly. Well, generally speaking all of those adjectives add up to the fact that it is charged that an act was done with a criminal intent. And with respect to the component parts I have to define for you the contents of each of those words. And it is in keeping with this basic concept that the evil hand must be united with an evil mind in the doing of an act to constitute the crime.

Now, here it could be said with justification that this particular charge is not too artistically drawn, and these words, as you find them in the particular charge, are to a degree misplaced. However, I have told you that the charge is that on or about the date alleged the defendant did endeavor to influence, obstruct and impede the due administration of justice in violation of section 1503. Now, it is that concluding clause that saves the day by requiring an inference from that concluding clause

that the alleged act was done with a criminal intent. So that after the word "did" in the third line you are to understand that at that point the law inserts that it is charged that the act alleged was done with a criminal [144] intent. And thus you should read that as though it were written, "did knowingly, wilfully, unlawfully and feloniously endeavor to influence, obstruct and impede the due administration of justice."

Then you ask, how was that act supposed to have been done? What was the act that is alleged to have impeded the due administration of justice where it is charged that he "did knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence, intimidate, impede Samson N. Peneku," and so forth in the discharge of his duty as a juror in the case of United States vs. Fujimoto? The latter phraseology is not an exact quote, but it is a paraphrasing by me of the substance of the allegation in that regard. Now, actually these words which are misplaced, which should be read after the word "did" as I have mentioned, are in the nature superfluous words except that as it is worded here they are not for they are repeated at this point expressly for the purpose of indicating that what was done with reference to this juror Peneku was done to interfere with him in the discharge of his duties as a juror. So that here you must be able, as I told you before, to arrive at a verdict of guilty to find that the government has proven beyond a reasonable doubt that the defendant did the act of corruptly endeavoring to influence, intimidate and

impede Samson N. Peneku who was then a juror in that particular case.

Now, I say "corruptly endeavored." That implies also [145] criminal intent. Now, that is the act you must find was done, namely, endeavored to influence, intimidate, impede Samson N. Peneku corruptly, that is, with a criminal intent. So you must next find, if you can, from the evidence in order to reach a conclusion of guilt, that the act of endeavoring to influence, intimidate and impede the juror Peneku, that it was done with a criminal intent, namely, done with a guilty mind, knowing it was wrong, knowing that it was the doing of an act that was prohibited by law.

Now, I have also told you that criminal intent is never proven by direct evidence, because you cannot read a man's mind except from circumstantial evidence, and men are understood to intend—being sane people—to intend the natural and probable consequence of their acts. So if you find that this individual charged here did the act prohibited by statute intentionally and with an evil disposition, then you would have the combination of the guilty hand and the guilty mind going together which constitutes the doing of an act with a criminal intent.

Now, if either of those elements are lacking, your verdict must be a verdict of not guilty.

So, to repeat myself, you have asked me to again define the words "knowingly, wilfully, unlawfully, feloniously and corruptly," and to also clarify the meaning of "criminal intent." Well, all of those words, "knowingly, wilfully, [146] unlawfully, felo-

niously and corruptly," are elements that are badges of criminal intent. And if an act was done in the manner described, namely, knowingly, wilfully, unlawfully, feloniously and corruptly and was a prohibited act, it would then be done with a criminal intent.

To repeat, "knowingly" means to have been conscious of what you were doing. For example, that you weren't walking in your sleep or that you weren't under the influence of some drug, but that you knew what you were doing.

"Wilfully" means done with design, purposely.

"Unlawfully" means doing something that was prohibited by law.

"Feloniously" means with a criminal intent, with an evil disposition, doing something consciously, knowing that it was wrong, with a guilty mind.

And this other word "corruptly" is a word that is used in this statute and used in this indictment and which is synonymous in point of law with the requirement of proof of criminal intent. And that is why I told you with respect to the statute that when the statute talked about whoever corruptly did thus and so that that in point of law meant whoever did thus and so which is the prohibited act with a criminal intent.

Now, maybe I have confused you more. I don't know. But let me turn to some of the words of the Supreme Court and [147] see if they have expressed in there any clear language. Well, they talk in the Morisette case a great deal about criminal intent, but in lawyer's language that perhaps if read out

of context might be more confusing to you than my explanation, but they do quote at page 247 of 342 U. S. from a case which says this and which is in keeping with that which I have told you.

"It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system (unless in exceptional cases), both must be found by the jury to justify a conviction for crime."

That is end of the quotation. There must be, to add my own words again, although they are borrowed words, the combination of the doing of a prohibited act with a criminal intent, with a guilty knowledge, guilty mind, evil disposition. And to have done with that disposition which the law prohibited consciously and purposely.

Very well. I am hopeful that this explanation will enable you to go about your work with dispatch and in addition will be satisfying. And if you will step outside for a moment while I speak to the lawyers and see what they say of what I said to you, then I will call you back.

(Jury leaves court room at 5:35 p.m.)

The Court: Very well. The jury is now absent from the court room. To that which I have said to the jury [148] additionally in response to their questions are there any exceptions to be taken?

Mr. Richardson: Not from the government, sir.

Mr. Soares: The only thing I wish to comment on, if the Court please, is the protection of the posi-

tion that I have consistently taken, with particular reference to your Honor's opening remarks that certain words were misplaced in the indictment, and that the law inserts that it is charged—of course we adhere to the position that "corruptly" should have qualified "endeavor."

The Court: Oh, I agree with you. I agree with you. All I am saying to them is that by the concluding phrase, in violation of section 1503, the government has been saved against your objection by that, implying criminal intent. And it should be read just as if the word "corruptly" appeared after the word "did." Then you translate the word "criminally" into "criminal intent."

Mr. Soares: More than anything else I am here to protect the position because so often you call the Court's attention to it and you recede from the position and all that.

The Court: Yes. All right. Perhaps I might in conclusion tell them that again in just that simple language and put a period there, because that perhaps is even a better way of expressing it.

Mr. Soares: I think that our position is properly [149] taken care of. I would prefer to allow the jury to go out with what your Honor has said directly, which I think has been well said, than to have them distracted.

The Court. You don't want me to make it any clearer?

Mr. Soares: No, I won't mind how clear your Honor makes it. But to say that it was misplaced

or appeared there or another place is going to distract their attention.

The Court: Well, the fact is, as you know, that the government did misplace this emphasis in this indictment.

Mr. Soares: That is true enough. That is why we said that we should not go to trial on the indictment. But that is neither here nor there and it is taken care of. I agree that it should have taken out all references to corrupting and leave it as to influencing the administration of justice.

The Court: Well, in any event, my ruling is that the concluding phrase saved the day for them. And I have charged them that the prohibited act must have been done with a criminal intent. I think what is bothering them must be the repetition of that phrase with respect to the juror Peneku. And I think they can't quite figure out whether or not there is a charge here of doing an act, of doing acts or one act. In any event, I think that I have explained it to them adequately and as clearly as can be done. And if that doesn't clear it up, why, we will see what happens by way of additional questions that may be asked. [150]

(Jury returns to court room at 5:40 p.m.)

The Court: Note the presence of the jury and the defendant together with counsel. I have nothing further to add other than to ask if you feel that your questions have been answered and if you stand ready to go back to the jury room to deliberate further, or are there additional questions that you want to ask at this time?

Juror Soon: Can we ask you——

The Court: Just a minute until I get your name. Just ask a question.

Juror Soon: Well, there are two points there at the beginning where you stated on the verdict of guilty you must have two things. If one of them is lacking you have to go the other way. Would you mind going over that part again?

The Court. I would be very happy to. With respect to an alleged crime of the felony type—a felony is a kind of a crime for which the prescribed punishment is more than one year—for that kind of a crime, the proof must consist of proof beyond a reasonable doubt in order to have a conviction; that not only was the prohibited act done in fact but that in fact it was also done with a criminal intent. So that from the evidence you must determine as to whether or not if the act was done it was done with a criminal intent. Now, you have to break down criminal intent to find out what that looks like. And you find that it looks like, so to [151] speak, the doing of an act knowingly, wilfully, unlawfully and feloniously. Now, how do you do an act knowingly? You do it consciously as distinguished from accidentally. Wilfully, you do it purposely, designedly. Unlawfully, you know that you are doing something that the law prohibits. And a man is presumed to know the law. The only relevancy of ignorance of the law is with respect to criminal intent. If there was complete ignorance of the law and you are satisfied on that score, then there might be said to be no criminal intent, de-

pending on the evidence. And the next word is "feloniously," done with the mind and disposition of a felon, one who is bent on doing evil, with an evil mind or disposition. So that is what the old common law phrase means, the doing of a prohibited act with an evil hand combined with an evil mind. And it is the two things together that constitute the crime. If either one of them is lacking, if either criminal intent is lacking or proof beyond a reasonable doubt that the act was not done, there is a failure or proof in either of those two essentials, then your duty is to acquit.

On the other hand, if the proof satisfies you beyond a reasonable doubt that the prohibited act was done with a criminal intent, then your duty is to convict. Does that help you?

Juror Soon: Do you have to have knowledge of the law? [152]

The Court: No, you don't have to have knowledge of the law, because every man is presumed to know the law. You are charged with knowing the law. The only relevancy of ignorance of the law is with respect to whether or not if there is proof of ignorance of the law that can be said to negative criminal intent. Let me give you that instruction again. Now, certainly before I give it to you, what is meant by what I last said is this, that if you didn't know the law in fact prohibited a particular act then it might be said that lacking that actual knowledge you did not do an act with a criminal intent.

Let me read that instruction to you.

"It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law. Nor is ignorance of the law available as a defense to a person who has committed a crime. Everyone is presumed to have knowledge of what the law forbids and what the law commands. However, evidence, direct or circumstantial, that the accused acted or failed to act because of ignorance of the law is to be considered by you in determining whether or not the accused acted or failed to act with a criminal intent as charged."

Now, you are to determine whether or not here there is any evidence of ignorance of the law. If there is, then you are to determine whether or not the accused acted with or without criminal intent charged. Does that help you? [153]

Juror Soon: Yes, sir.

The Court: Anything further? All right. You will return—oh, excuse me. Would you like them to go out again or would you like to step to the bench?

Mr. Soares: No.

The Court: All right. You will be taken to the jury room to deliberate further and the court will stand at recess to await your verdict.

(The jury retired again to the jury room at 5:48 p.m.)

(The jury returned to the court room at 9:24 p.m.)

The Court: Note the presence of the jury and of the defendant together with counsel. Mr. Chastain, I am advised by a note from you that the jury has arrived at a verdict. Is that correct?

The Foreman: That is right, your Honor.

The Court: Will you please hand the same to the Clerk.

(The foreman hands an envelope to the clerk.)

The Court: Very well. The defendant will rise. The Clerk will read the verdict.

The Clerk: Omitting the heading, title and cause—"Verdict."

"We, the jury, duly empaneled and sworn in the above-entitled cause, do hereby find the defendant, Stephen Kong, guilty as charged in the indictment herein. [154]

"Dated: Honolulu, T.H., this 17th day of August, 1953.

"Samuel L. Chastain, Foreman."

The Court: Such, Mr. Foreman, is the verdict of the jury?

The Foreman: Yes, your Honor.

The Court: So say you all, ladies and gentlemen of the jury?

(Affirmative response.)

The Court: Do you wish the jury polled?

Mr. Soares: No.

The Court: Very well. Thank you very much,

ladies and gentlemen. Your duty is performed, in accordance with the obligations as jurors. The verdict will be accepted and recorded on the basis of which—the verdict being one of guilty—thus the defendant is adjudged guilty, and the jury is excused until when? Is it Thursday?

The Clerk: Wednesday morning at 9 o'clock.

The Court: At 9 o'clock. Very well. The defendant will report tomorrow morning at 9:00 to the probation officer for pre-sentence investigation. The jury is excused. Thank you very much. The court will stand adjourned after the jury is excused.

(Jury leaves courtroom.)

The Court: How about bond, Mr. [155] Richardson?

Mr. Richardson: We don't insist on any increase. I think we can continue the same bond. I think it is a thousand dollars. I am not sure.

Mr. Soares: Are you thinking of increasing the bond?

Mr. Richardson: I just said I didn't ask for an increase. Whatever it is, if your Honor please, we would submit to the same figure, if it is all right with the Court.

The Court: The record will show in a moment what it is.

Mr. Soares: It could be endorsed on the face of the indictment, your Honor.

The Court: That may be where it is. Is it on the face of the indictment, Mr. Clerk?

The Clerk: No, your Honor. It was in a secret file, your Honor.

Mr. Richardson: If your Honor please, it is possible that no bond had been posted in this case.

The Clerk: I don't think he made bond.

Mr. Richardson: In that case, I think we should have some sort of a bond after conviction.

Mr. Soares: If there is no bond, I am going to ask none be required.

The Court: I would go along with that proposition, but I think, as you do, that there should be a——

Mr. Soares: I am not making a point, if there is no [156] bond, and you are justified in asking for one.

Mr. Richardson: Well, I suggest a thousand dollar bond.

The Court: Very well. If there is no bond, the subject has been overlooked through inadvertence and let the bond then be set. I repeat again, if there is no bond, that it set in the sum of one thousand dollars, and I will give the defendant until 4 o'clock tomorrow to post the same.

Mr. Soares: Thank you.

The Court: However, he will report tomorrow morning at 9 o'clock to the probation officer for presentence investigation.

Mr. Clerk: Here are the notes from the jury.

The Court: Very well. The Court will stand adjourned.

(The Court adjourned at 9:30 p.m.)

[Endorsed]: Filed October 8, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL

United States of America
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from page 1 to page 234, consists of a statement of the names and addresses of the attorneys of record, and of the original pleadings and transcripts of proceedings as hereinbelow listed and indicated:

Pages

Transcript of Proceedings Aug. 14, 17, 1953 ..... 74 -234

I further certify that included in said record on appeal is a copy of the Minutes of Court of February 18; July 15, 20; August 14, and August 17, 1953 5-9

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 13th day of October, A. D., 1953.

[Seal] /s/ WM. F. THOMPSON, JR.,

Clerk, United States District Court, District of Hawaii.

[Endorsed: No. 14086. United States Court of Appeals for the Ninth Circuit. Stephen Kong, Jr., Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed October 20, 1953.

/s/ PAUL P. OBRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Cr. No. 10,704

STEPHEN KONG, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS INTENDED TO BE RELIED UPON ON APPEAL

Comes now Stephen Kong, Jr., appellant, by O. P. Soares, his attorney, and hereby makes his statement of points intended to be relied upon on appeal, to-wit:

1. The Court should have granted appellant's motion to dismiss the indictment on each of the grounds thereof, namely:

(a) The defendant had been in jeopardy of conviction of the offense charged in said indictment;

(b) The defendant was deprived of his right to a speedy trial;

(c) The indictment does not state facts sufficient to constitute an offense against the United States.

2. That the Court erred in refusing to give defendant's requested Instructions Nos. 1, 2, 3 and 4.

3. The Court erred in instructing the jury that the indictment otherwise faulty was made good by reading into it at a designated point a word which was not there.

4. The Court erred in denying defendant's motion for judgment of acquittal as to each of the following grounds of said motion:

(a) That the indictment does not charge the defendant with corruptly endeavoring to influence the due administration of justice;

(b) That the indictment does not indicate the manner in which due administration of justice was attempted to be interfered with;

(c) That the charge against the appellant is not clearly stated;

(d) That the evidence failed to show an endeavor on the part of the defendant to act corruptly;

(e) That there was no evidence of motive.

5. That the indictment upon which the appellant was tried is so vague, ambiguous and uncertain as to deprive appellant of his Constitutional rights.

6. That the indictment upon which the appellant was tried fails to allege facts consisting an offense against the United States.

Dated: Honolulu, Hawaii, October 19, 1953.

STEPHEN KONG, JR.,
Appellant,

By /s/ O. P. SOARES,
His Attorney.

Service of copy acknowledged.

[Endorsed]: Filed October 20, 1953.

No. 14,086

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN KONG, JR.,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

On Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLANT.

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I.

STATEMENT OF JURISDICTION.

By indictment returned by a grand jury in the United States District Court for the District of Hawaii it is charged that appellant "did endeavor to influence, obstruct, and impede the due administration of justice." Upon conviction he was sentenced on the 4th day of September, 1953 to imprisonment for three years, (R. pp. 14 and 15) and in due time gave notice of, and perfected, his appeal. (R. p. 16.)

The trial judge, Honorable J. Frank McLaughlin, believing that this appeal presents a substantial ques-

tion to be ruled on by this Court, admitted appellant to bail pending appeal.

The jurisdiction of this Court to review the judgment of the District Court derives from Title 28 of the United States Code, "Judiciary and Judicial Procedure," Sections 1291 and 1294.

II.

STATEMENT OF THE CASE.

An indictment purporting to charge appellant with a violation of Section 1503 of Title 18 of the United States Code was found by a United States grand jury in the District of Hawaii on February 18, 1953. (R. p. 3.)

In a conference at the bench of the presiding judge who had received the report of the grand jury, the following took place, care being taken that none of it should be heard by any one other than the parties to the conference and the official Court reporter.

> Mr. Barlow. I am inviting attention to an indictment that has been returned against Steven Kong, Jr., and ask at this time that the indictment be placed on the secret file for the following reasons: The individual who had been approached in this matter was a man by the name of Peneku. At the time he was approached he was duly impaneled to serve as a juror in the Fujimoto-Smith Act trial which is now in progress before Judge Jon Wiig, and in order that the government can never be accused of

creating a climate that perhaps may be prejudicial to any of the defendants, the government at this time would like to have the matter put in the secret file until such time as the Smith Act case before Judge Wiig is terminated.

The Court. Very well. Although it does not fit squarely within the technical provisions of rule 6 (e), I will nevertheless grant the request in view of the fact that it is the government that asks for it and assumes the responsibility of the man fleeing the jurisdiction before the indictment is released from the secret file.

Mr. Barlow. Thank you.

The Court. And as soon as that particular case, so-called Smith Act case, is over, that is over in the legal sense, in this Court exclusive of any appeals.

Mr. Barlow. That is right, your Honor.

The Court. This indictment then automatically comes off the secret file.

Mr. Barlow. Thank you, sir.

(R. pp. 4 and 5.)

It was not until after a verdict of guilt against all seven defendants in the Fujimoto-Smith Act trial referred to above that the indictment in this case was taken off the secret file and this appellant for the first time knew of its existence. This occurred nearly five months after the indictment of appellant, that is to say, approximately July 15, 1953.

Before entering a plea of not guilty appellant filed a motion to dismiss the indictment on the grounds, among others, that he was deprived of his right to

a speedy trial and that the indictment does not state facts sufficient to constitute an offense against the United States.

The motion to dismiss the indictment was denied. Upon his plea of not guilty, appellant went to trial before a jury which after being out slightly more than nine hours including time for luncheon and dinner, found him guilty.

After one Samson Nani Peneku had been selected and sworn as a juror to hear the aforementioned Smith Act case, and before any evidence had been adduced in that case, appellant, who was keeping company with Peneku's niece, was at Peneku's home which he had been in the habit of visiting together with the niece, the following occurred:

Q. Now, Mr. Peneku, what were the people in the house doing? Were they sitting there talking?

A. We had a few bottles of beer with the exception of my Mrs. and I.

Q. You had a few beers?

A. Yes.

Q. Who brought the beer to the house?

A. Mrs. Gohier.

Q. Did you see Mr. Kong?

A. Yes.

Q. What were you doing?

A. I was lying down on the punee.

Q. Were you reading?

A. Yes, sir.

Q. What were the rest of them doing?

A. They were sitting around the table and talking.

Q. After the conversation, did Mr. Kong come to you and say anything?

A. I didn't understand you.

Q. Did Mr. Kong, the defendant here, come over to you while you were on the couch reading and say anything to you?

A. Yes.

Q. What did he say?

A. He said, "Hey, you, I want to talk to you."

Q. Did he say anything else?

A. No, that was all.

Q. What did you say?

A. I hesitated for a while and I looked at him and finally I stood up and went with him.

Q. Where did you go?

A. We went to my father-in-law's room.

Q. Was anyone else in the room?

A. No, sir.

Q. Did you have a conversation with Mr. Kong in the room?

A. Yes, sir.

Q. Just tell us as well as you can remember, Mr. Peneku, what was said to you and what you said to him.

A. Yes, sir. Well, he said he wanted me to vote not guilty against the Smith Act because Harriet was a great friend of his.

Q. Who was a great friend of his?

A. Harriet.

Q. Do you know anyone named "Harriet"?

A. At that time I didn't know who Harriet was, but after I recalled Harriet Bouslog, the lawyer. He didn't mention it, but to my opinion that is the only one I could think of, Harriet Bouslog.

Mr. Soares. I move that the opinion be stricken and the jury instructed to disregard it.

The Court. Yes. His opinion as to what the speaker who used the name "Harriet" meant may go out. We are only interested in what he understood himself.

Q. (by Mr. Richardson). What was it that was said about Harriet?

A. That Harriet was a great friend of his, that she was going to take up his case on Maui for his mother.

Q. And you stated he asked you to vote not guilty?

A. Yes, sir.

Q. What did you understand him to mean by that?

Mr. Soares. We object to the witness' understanding, and ask that the jury draw its own conclusions as to the proper understanding to be drawn from those remarks.

Mr. Richardson. This is the witness' understanding that I am asking for.

The Court. The witness may answer.

Q. (by Mr. Richardson). What did you understand him to mean when he asked you——

The Court. No.

Mr. Richardson. I phrased it wrong. What did I ask you?

The Court. In any situation like that I will not let a witness testify as to what he thinks the

speaker meant, but I will let the witness testify as to what he understood was meant by the words used.

Mr. Soares. We object to that situation for the same reason.

The Court. Very well.

Mr. Richardson. May I proceed?

The Court. Make sure the witness understands the question.

Q. (by Mr. Richardson). What was your understanding of Mr. Kong's statement to you?

A. Well, he said that Harriet was a good friend of his; that she was going to handle his mother's case on Maui.

Mr. Soares. I can't hear the last words. The witness dropped his voice.

The Court. Speak up.

The Witness. And that Harriet was going to defend his mother on Maui.

Q. (by Mr. Richardson). What was your understanding of what he said about voting not guilty?

Mr. Soares. We object to that, if the Court please. He can't usurp the functions of the jury. The jury is given the facts and they will determine whether or not this man acted corruptly. He can't set up an opinion for them by stating, "As for me, I understood thus and so."

The Court. The witness may testify, as I have already ruled, as to what he understood the speaker to mean, so far as the witness is concerned.

Q. (by Mr. Richardson). The question is what was your understanding of what Mr. Kong said to you?

A. That is what he said, that Harriet was a good friend of his; that she was going to take up the case of his mother.

Q. You said he asked you to vote not guilty?

A. Yes, sir.

Q. What was your understanding of that with reference to what he said, with reference to voting not guilty?

A. He told me to vote not guilty. I said, "No, no, I can't do that."

Q. What did you understand the words, "not guilty" meant? Vote not guilty in what way?

Mr. Soares. We urge the same objection, if the Court please. Let him tell the whole conversation.

The Court. It is the same objection, but I think what you mean is that the question is leading. That objection would be good.

Mr. Richardson. This is a difficult witness. If I could have a little latitude—I am not trying to testify for him.

The Court. I agree that he is slightly difficult, but it would be much better, under the circumstances, if you would exhaust the possibility of telling what happened completely and clearly.

Q. (by Mr. Richardson). Was that everything that was said back there in the room between you and Mr. Kong? Was anything else said?

A. I don't remember anything else that was said, but there was one understanding in my mind in regard to vote "not guilty" and I took it for the Smith Act case.

Q. That was your understanding?

A. Yes, that was my understanding.

Q. How did you feel about what he said to you?

A. I didn't tell——

Mr. Soares. Objected to as being incompetent, irrelevant and immaterial, the witness' reaction, a personal feeling in the matter.

The Court. The objection is sustained.

Q. (by Mr. Richardson). Did you have any reaction to what he said, Mr. Peneku?

A. Well——

Mr. Soares. If you can't testify to what his reaction was, whether he had one or not becomes immaterial. We object to the question on that ground, in view of the Court's last ruling.

The Court. No, this is a different question. A reaction to what he said might be additional words. I don't know. However, don't by this question be seeking to circumvent my prior ruling.

Mr. Richardson. No, I am asking his reaction to it.

Q. (by Mr. Richardson). What was your reaction to what he said?

A. I got mad right off the bat and I opened the door and I said, "Get out."

Q. Did he leave?

A. I told him to get out. He went ahead and I closed the door. He walked out to the kitchen. They sat there a little while and scrammed.

Q. What was the last?

A. They sat down a little while and then scrammed, left the house.

Q. Whom do you mean by "they"?
A. Mrs. Gohier and Kong.
(R. pp. 67-72.)

This incident which occurred on November 8, 1952 was promptly reported to the judge presiding at the Smith Act trial who cited appellant for contempt. After a hearing in the judge's chambers no action was taken other than to excuse the juror Peneku whereupon the trial of the Smith Act case proceeded with one of the extra jurors who had been selected and sworn at the same time as was Peneku sitting in his place.

The trial of appellant having finally been commenced, at the conclusion of the evidence and in the presence of the jury appellant moved for a judgment of acquittal on each of the grounds heretofore laid in the motion to dismiss the indictment and with reference to the indictment itself that it is insufficient in that it merely charges the defendant did endeavor to influence the due administration of justice, whereas it does not allege that he did so corruptly; that it does not indicate the matter in which the due administration of justice was attempted to be interfered with and it is not clear from the indictment whether the charge is an endeavor to influence the juror or the due administration of justice or both. Further, that there is no evidence, at least no evidence amounting to more than a mere scintilla of an

endeavor that the defendant acted corruptly and no evidence of motive.

The motion for judgment of acquittal was denied.

III.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court erred in denying appellant's motion to dismiss the indictment and in denying appellant's motion for a judgment of acquittal on the ground that appellant was deprived of his right to a speedy trial.

2. The Court erred in denying appellant's motion to dismiss the indictment and in denying appellant's motion for a judgment of acquittal on the ground of the insufficiency of the indictment.

3. The Court erred in instructing the jury that the indictment, otherwise faulty, was made sufficient by reading into it language which was not there.

4. The Court erred in refusing to instruct the jury more specifically in accordance with instructions Nos. 3 and 4 requested by appellant as to the meaning of the word "endeavor" as used in the statute.

5. The Court erred in ruling that motive is not an element of the offense and, for that reason alone, refusing to instruct the jury in accordance with defendant's requested instruction No. 2.

IV.

ARGUMENT.

SPECIFICATION OF ERROR NO. 1.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND THAT APPELLANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL.

The indictment against appellant was placed on the secret file, not for any of the recognized reasons and as provided in Rule 6 (e), but at the request of the United States Attorney to avoid criticism which could have no basis in fact. (R. pp. 4 and 5.)

The right to a speedy trial is granted by the Constitution of the United States. While it is a right which a defendant may waive, it is not one that the government can take away.

This is a case of first instance. None of the reported cases that we have been able to find on this subject deals with a situation in which, as in this case, an indictment was placed on the secret file to keep the accused from being forewarned or to avoid being apprehended. The basis for placing this indictment on the sceret file was, in effect, personal to the prosecuting officer: he wanted to avoid possible criticism by communists then on trial and subsequently convicted of a violation of the Smith Act. In other words, in order to assure those Communists of a more favorable "climate" (to use the District Attorney's own term) he was willing that appellant

be deprived of a constitutional right personal to him and in nowise in conflict with any right of the government. It is noteworthy that in requesting the placing of the indictment against the defendant on the secret file it was not contended by anyone that the government would be hampered in its prosecution of the Smith Act case referred to or that to let it be known to the defendant that he had been indicted, thus giving him an early start in preparing for his defense, would have probably or even possibly resulted in a miscarriage of justice to the Communists then on trial.

Nor is it incumbent upon a defendant whose right to a speedy trial has been interrupted to show (as the trial judge in the case below intimated), that he lost an advantage such as losing the evidence of witnesses. For, as has been said fairly recently by a prominent jurist, even though it is extremely unlikely that one accused of crime suffered the slightest handicap from the withholding or denial of a right, "we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor."

SPECIFICATION OF ERROR NO. 2.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND OF THE INSUFFICIENCY OF THE INDICTMENT.

SPECIFICATION OF ERROR NO. 3.

THE COURT ERRED IN INSTRUCTING THE JURY THAT THE INDICTMENT, OTHERWISE FAULTY, WAS MADE SUFFICIENT BY READING INTO IT LANGUAGE WHICH WAS NOT THERE.

The indictment against Stephen Kong, Jr., appellant herein, was returned on February 18, 1953, appellant being charged with endeavoring to influence, obstruct and impede the due administration of justice in violation of Section 1503, Title 18, United States Code. The indictment reads as follows:

> That on or about November 8, 1952, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Stephen Kong, Jr., did endeavor to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence, intimidate and impede Samson Nani Peneku, the said Samson Nani Peneku being then and there a trial juror duly impaneled and sworn in the case of United States vs. Charles Fujimoto, et al., Cr. No. 10,495, pending in the United States District Court for the Territory of Hawaii, in violation of Section 1503, Title 18, United States Code.

The indictment thus charges appellant with an endeavor to impede the due administration of justice. The appellant is accused of attempting to influence Samson Nani Peneku, a trial juror. However, the charge contained in the indictment fails to make the averment that the appellant corruptly endeavored to influence the due administration of justice. Any reference to the attempt being a corrupt or unlawful one is omitted from the part of the indictment charging the appellant with an offense. This amounts to an omission of an essential element from the charge which makes the indictment fatally defective.

The statute covering the offense, Section 1503, requires that the due administration of justice be influenced, obstructed or impeded, either corruptly, or by threats or force, or by threatening letter or communication. The indictment fails to charge that the endeavor was made in any of the ways mentioned above. It merely charges that an endeavor was made by the appellant to influence, obstruct or impede the due administration of justice.

This omission was called to the attention of the trial judge, and the trial judge who was then aware of this defect in the indictment instructed the jury that the word "corruptly" was to be read into the charge. The Court instructed the jury in the following language on this point:

> Without changing anything that I have said to you with respect to this word "corruptly," it has been brought to my attention that in the

> third line of this indictment it says that the defendant did endeavor to influence, obstruct and impede the due administration of justice. Then it goes on in that he did thus and so. Now, with respect to the charging part, that he did endeavor to influence and obstruct and impede the due administration of justice, by way of interpreting the charge you have to drop down to the bottom where it says in violation of Section 1503 and that charge implies that he did it corruptly as the statute alleges, as the nature of the offense, which in turn means he did it with a criminal intent. So that you are to understand the charges to be that the defendant did corruptly, that is, did with a criminal intent knowingly, wilfully, unlawfully and feloniously endeavor to influence, obstruct and impede the due administration of justice by doing thus and so. And of course, "so" refers to the words used that follow the phrase, "in that he did," so and so. Very well. Does that clear up the point? (R. 180.)

The insertion of a word which was not in the indictment amounted to an amendment of the charge. Appellant submits that the amendment was one of substance and not merely one of form.

The indictment is also faulty in that it fails to indicate clearly the manner in which the due administration of justice was attempted to be interfered with. The indictment charges that the due administration of justice was obstructed in that there was an endeavor to influence, intimidate and impede

Samson Nani Peneku. It further describes Samson Nani Peneku as a trial juror in a case pending before the United States District Court for the Territory of Hawaii. However, there is no reference to the fact that an attempt was made to influence, intimidate and impede Samson Nani Peneku in the discharge of his duty as a juror. The statute does not condemn every attempt to influence a juror. A scrutiny of Section 1503 makes it obvious that it is not every attempt to influence a juror that is proscribed by its terms. What is made criminal by the section is an attempt to influence a person in the discharge of his duty as a juror. The indictment is made fatally defective by the omission of this essential element of the crime charged.

The Sixth Amendment to the Constitution of the United States guarantees the accused in a criminal case the right to be informed of the nature and cause of the accusation. *Asgill v. United States,* 60 F.2d 780 (C.A.4). The function of the indictment is to provide this requisite notice to the defendant. Appellant submits that the indictment herein failed to provide the required information. A person indicted for violating a criminal statute is presumed innocent and the sufficiency of an indictment must be tested upon the presumption that the defendant is innocent and does not have any knowledge of the facts charged. 31 Corpus Juris 653. When the indictment herein is read in the light of the presumption of innocence it is obvious that an indictment

which omits several of the essential elements of the crime charged is fatally defective.

The statute herein involved makes a corrupt intent an essential element of any charge brought under it. The omission of this material element makes the indictment defective in substance. An indictment is sufficient to withstand attack only if it alleges every material element of the offense directly and with certainty. *Pettibone v. United States,* 148 US 197, 37 L.ed. 419; *United States v. Hess,* 124 US 483; *Harris v. United States,* 104 F.2d 41 (C.A. 8); *White v. United States,* 67 F.2d 71 (C.A. 10). The trial judge was of the opinion that the necessary element of corrupt intent was supplied by inference. In reply to a request from the jury that the meaning of criminal intent be clarified, he said:

> * * * Now, here it could be said with justification that this particular charge is not too artistically drawn, and these words, as you find them in the particular charge, are to a degree misplaced. However, I have told you that the charge is that on or about the date alleged the defendant did endeavor to influence, obstruct and impede the due administration of justice in violation of section 1503. Now it is that concluding clause that saves the day by requiring an inference from that concluding clause that the alleged act was done with a criminal intent. So that after the word "did" in the third line you are to understand that at that point the law inserts that it is charged that the act alleged was done with a criminal intent. And thus you

should read that as though it were written, "did knowingly, wilfully, unlawfully and feloniously endeavor to influence, obstruct and impede the due administration of justice." (R. 183-184.)

Regardless of whether the trial judge's opinion was that the necessary element of an unlawful intent was supplied by inference, the decided cases on this point are clear that any of the material elements of a crime cannot be supplied by inference, intendment, or implication. *Pettibone v. United States, supra; United States v. Carnay,* DC, 228 F. 163. Although legislation may proceed by implication, good pleading may not.

Where an essential word or clause is omitted from the indictment, the omission is fatal to the indictment, even though the Court may know what was intended. *Kutler v. United States,* 79 F.2d 440 (C.A. 3.)

The trial judge, however, was of the opinion that an essential element in the indictment was supplied by inference. He went further and instructed the jury that they were to insert a word into the indictment which was not there. This would almost amount to an amendment of the indictment not permitted by the proposition of law that only a grand jury can return an indictment. *Ex parte Bain,* 121 U.S. 1, 30 L.ed. 849. Appellant submits that the omission of the allegation of corrupt intent from the charging part of the indictment makes the indictment fatally defective.

As mentioned previously another averment necessary to support the charge herein is that the endeavor to influence a juror must be made in relation to the discharge of his jury duty. The indictment herein failed to make such an allegation. The indictment contains the description of the juror in a pending case but neglects to aver that the defendant endeavored to influence the juror in the discharge of his duty as such. Section 1503 does not make it a crime to influence a juror on any matter. It condemns the influencing of a juror in the exercise of his duty as a juror. Here again we have a situation when the trial Court found it necessary to read something into the indictment by inference. The fact that the statute involved read in the light of the common law, and of other statutes on like matters, enables the Court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all of the facts necessary to bring the case within that intent. *United States v. Cruikshank,* 92 U.S. 542; *United States v. Carll,* 105 U.S. 611, 26 L.ed. 1135. See also *Harris v. United States, supra.* Appellant submits that this omission also made the indictment fatally defective.

SPECIFICATION OF ERROR NO. 4.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY MORE SPECIFICALLY AND IN ACCORDANCE WITH INSTRUCTIONS NOS. 3 AND 4 REQUESTED BY APPELLANT AS TO THE MEANING OF THE WORD "ENDEAVOR" AS USED IN THE STATUTE.

On the authority of *United States v. Russell,* 255 U.S. 138, 143, appellant requested the trial judge to instruct the jury as follows:

Defendant's Requested Instruction No. 3

> The word "endeavor" as used in the statute and in the indictment means more than a simple request unaccompanied by any effort or inducement to have the request granted. (R. p. 4.)

Defendant's Requested Instruction No. 4

> The word "endeavor" is distinguished from synonymous words such as "attempt" or "effort" by the fact that the synonymous words relate to a single act whereas the word "endeavor" means a continued series of acts. (R. p. 4.)

In instructing the jury, all that the trial judge said in the nature of definition of the word "endeavor" and its significance in the statute was:

> Now, the word "endeavor" is used. That word means exactly what you think it means, namely, to attempt, to try. It does not mean that the attempt has to be successful. It might be, but it doesn't have to be. The thing that is declared to be wrong is the attempting, the trying to influence the administration of justice improperly, whether that succeeds or not. (R. p. 172.)

The evidence showed that what appellant did was to make a request of the juror that as a favor to him he vote "not guilty"; and this in the interim between the swearing in of the jury and the introduction of a single witness upon noting the juror's reaction to the request, appellant pressed it no further.

With the Court's over-simplification of the meaning of the term "endeavor," and without a more complete definition of it as understood in law, such as contained in the requested instructions, the jury was prevented from distinguishing from a thoughtless request and an *endeavor* to corrupt.

SPECIFICATION OF ERROR NO. 5.

THE COURT ERRED IN RULING THAT MOTIVE IS NOT AN ELEMENT OF THE OFFENSE, AND FOR THAT REASON ALONE, REFUSING TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANT'S REQUESTED INSTRUCTION NO. 2.

The appellant, in writing, requested the Court to instruct the jury as follows:

> Defendant's Requested Instruction No. 2
>
> If you cannot unanimously say that you believe from the evidence that defendant's purpose in speaking to the juror Peneku was corrupt and that in doing so he was endeavoring to influence, obstruct, or impede the due administration of justice, your verdict must be not guilty. (R. p. 13.)

As appears from a notation on the requested instruction, it was denied because of the judge's ruling that in this case motive is not an element.

Now, the trial judge lingered long on the use of the word "corruptly" in the statute and in the indictment; so much so that he apparently had misgivings as to whether he had confused the jury on the subject. (R. p. 186.)

Had he but recognized that there can be no criminal intent (and, therefore, no crime such as here involved) without a motive and given appellant's requested instruction No. 2, the whole matter would have been made clear.

V.

CONCLUSION.

It is respectfully submitted that appellant was wrongfully convicted.

Dated, Honolulu, Hawaii,
March 29, 1954.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellant.

No. 14,086

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN KONG, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal Case No. 10,704.

BRIEF FOR APPELLEE.

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On Appeal from the United States District Court for the District of Hawaii in Criminal Case No. 10,704.

BRIEF FOR APPELLEE.

I.

STATEMENT OF JURISDICTION.

The District Court had jurisdiction at the trial in this case under 18 U.S.C. § 3231; Rule 18, Federal Rules of Criminal Procedure. After conviction, a timely appeal was taken, and the jurisdiction of this Court to review the judgment of the District Court is invoked under 28 U.S.C., §§ 1291 and 1294.

II.

STATEMENT OF THE CASE.

In addition to the matters presented by appellant in his brief, the following facts are pertinent to the case. In February 1953, when the indictment herein was returned by the Grand Jury, Judge Jon Wiig had been assigned the criminal calendar and was then sitting in the case of *United States v. Charles Kazuyuki Fujimoto, et al.,* Criminal No. 10,495. Judge Wiig directed that this matter be presented to the Grand Jury and if an indictment be found that it be put on the secret file (T. 36, 37, 44, 45).

III.

ARGUMENT OF THE CASE.

SPECIFICATION OF ERROR NO. 1.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND PROPERLY DENIED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND THAT APPELLANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL.

In England, from the very earliest time, a prisoner enjoyed the right to a speedy trial which was procured him by the commission of jail delivery, which issued to the justices of Assize, and twice every year resulted in the jails being cleared and the prisoners confined therein being convicted and punished or freed from custody. The Sixth Amendment to the Federal Constitution guarantees to an accused in a criminal prosecution under the federal law the right to a speedy

trial. However, no general principle fixes the exact time within which a trial must be had to satisfy the requirements of a speedy trial. Whether such a trial is afforded must be determined in the light of the circumstances of each particular case as a matter of judicial discretion. 22 C.J.S. Criminal Law § 466(b)(3). The Supreme Court of the United States in *Beavers v. Haubert,* 198 U.S. 77, 87, said: "The right of a speedy trial is necessarily relative. It is consistent with delay and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Associate Justice Edgerton, dissenting in *United States v. McWilliams,* App. D.C. 1947, 163 F.2d 695, after quoting from and citing *Beavers v. Haubert, supra,* said:

> "[The right to a speedy trial] is a right to be tried as soon as the interests of justice and the orderly conduct of the courts' business fairly permit."

It should be noted that the offense for which appellant was convicted occurred in November 1952. Three months later, in February 1953, appellant was indicted by the Grand Jury. Five months after that, in July 1953, the appellant made his motion to dismiss the indictment, complaining that he had not had a speedy trial, as guaranteed by the Constitution. He did not then, and he does not now, allege that he has been prejudiced by this so-called delay. On the contrary, in response to a question from the trial Court as to whether the defendant had lost the advantage of

having certain witnesses, his counsel replied: "No, if the Court please." (T. 28.) In *United States v. Holmes,* 3 Cir. 1948, 168 F.2d 888, the Court said:

> "In the complete absence of any indication that the instant defendant was adversely affected in the preparation or prosecution of his defense by the lapse of time in bringing this case to trial, we can see no ground for complaint by defendant on that score."

In that case, incidentally, the delay complained of was three years.

Be this as it may, it must be remembered that the seven and one half month so-called Smith Act trial was under way at the time the Grand Jury returned the indictment which trial was presided over by Judge Wiig and entitled *United States v. Charles Kazuyuki Fujimoto, et al.,* and that the person mentioned in this indictment, Samson Nani Peneku, was one of the jurors, he being discharged for reasons that are referred to in the indictment and which form the basis of the indictment. Under the circumstances surrounding that trial, it appears obvious that not only is this right to a speedy trial not an absolute right but it is one which must be balanced in the judgment of the Court and in the judgment of the prosecuting branch of our government with reference to the best interests of public justice and the individual constitutional rights of other defendants, particularly those then on trial in the same identical Court, especially where a case such as this grows out of the trial then in progress.

See *Delaney v. United States,* 1 Cir. 1952, 199 F.2d 107. Also see the comment of Chief Judge Swan in *United States v. Rosenberg,* 2 Cir. 1952, 200 F.2d 666, 670, in which he scores the United States Attorney for presenting and announcing an indictment which had the effect of seriously prejudicing the right of others who were at that time on trial in that jurisdiction. Such action would be, as the Court stated, grounds for a mistrial. It was to avoid just such a possibility that the indictment under consideration in the instant case was placed on the secret file and was not removed therefrom until the conclusion of the Smith Act trial above referred to. This was done, not for the personal reasons of the United States Attorney, but at the behest and on the recommendation of the judge who was then trying the Smith Act case.

SPECIFICATIONS OF ERROR NOS. 2 AND 3.

THE COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND CORRECTLY DENIED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND OF THE INSUFFICIENCY OF THE INDICTMENT, SUCH INDICTMENT BEING SUFFICIENT IN ALL RESPECTS.

Appellant complained that in the indictment he is charged with endeavoring to influence, obstruct and impede the due administration of justice, but that he is not charged with corruptly so endeavoring. Appellant's complaint, it is submitted, is without merit. Section 1503 of Title 18, U.S.C., the section under

which this indictment is brought, makes it a crime for anyone to endeavor to influence, obstruct and impede the due administration of justice. In *Broadbent v. United States,* 10 Cir. 1945, 149 F.2d 580, the Court found that *any* endeavor to influence a witness or to impede and obstruct justice falls within the connotation of the word "corruptly", as used in the former § 241 of Tile 18, U.S.C. (now § 1503). Also in *Bosselman v. United States,* 2 Cir. 1917, 239 Fed. 82, it was found that the word "corruptly" is capable of different meanings in different connections, and as used in the aforesaid former § 241, *any endeavor* to impede and obstruct the due administration of justice in the inquiries specified is corrupt. There are several ways in which this criminal conduct can be effected. One is by doing it corruptly, another by threat or force, another by threatening letters or communications. The indictment charges the appellant with endeavoring to influence, obstruct and impede the due administration of justice, and then goes on to show how he did so endeavor. He is charged with endeavoring to influence, obstruct and impede the due administration of justice by corruptly endeavoring to influence, intimidate and impede one Samson Nani Peneku, then and there a trial juror duly empaneled and sworn in another case pending before the United States District Court for the District of Hawaii, *in violation of 18 U.S.C. §1503.*

Rule 7(c) of the Federal Rules of Criminal Procedure provides that the indictment shall be a plain, concise and definite written statement of the essential

facts constituting the offense charged. These essential facts are certainly found within the framework, within the four corners of the indictment. In *Hicks v. United States,* 4 Cir. 1949, 173 F.2d 570, the gist of the charge was that the defendant feloniously and corruptly endeavored to influence a juror. The Court sustained the sufficiency of the indictment and quoted from the opinion of Judge Rose in the case of *Martin v. United States,* 4 Cir., 299 Fed. 287, 288, in which the jurist stated:

> "The sufficiency of a criminal pleading should be determined by practical, as distinguished from purely technical considerations. Does it, under all the circumstances of the case, tell the defendant all that he needs to know for his defense, and does it so specify that with which he is charged that he will be in no danger of being a second time put in jeopardy? If so it should be held good."

At this point a footnote refers to the Federal Rules of Criminal Procedure, Rule 52(a) which states that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. This rule is a restatement of the law existing at the time of its adoption, 28 U.S.C.A., former § 391 (second sentence) and 18 U.S.C.A., former § 556. In sustaining the sufficiency of an information, this Court in *Frederick v. United States,* 9 Cir. 1947, 163 F.2d 536, 546, stated:

> "Before leaving the subject of the sufficiency of the information, we might do well to advert to the

oft-quoted but oft-ignored statutory admonition—18 U.S.C.A. § 556:

> 'No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant * * *'."

Furthermore,

> "on the hearing of any appeal * * * in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C.A. § 2111.

Indictments under the new rules are not to be construed with the technical nicety that prevailed under the old procedure. Accordingly, indictments should be reasonably construed. See *United States v. Welsh, et al.,* 15 F.R.D. 189 (D.D.C.). In *United States v. Young* (D.D.C. 1953), 14 F.R.D. 406, Judge Holtzoff, who played an important part in drafting the Rules of Criminal Procedure, after quoting from Rule 7(c) providing that the indictment shall be a plain, concise and definite statement of the essential facts, and from Rule 2 that the rules shall be construed to secure "simplicity in procedure", stated:

> "One of the purposes of the new rules was to abrogate the technicalities which all too often had led to dismissal of indictments and to reversals of

> convictions on grounds that had no connection with the guilt or innocence of the defendant. This situation had long been a reproach to the administration of criminal law. Among the many refinements impeding the decision of criminal cases on their merits were numerous technical requirements as to the contents of the indictment and the manner in which averments should be made, all inherited from a bygone era. One of the chief purposes of the new rules was to jettison this superfluous cargo, which interfered with the determination of the basic question whether the defendant committed the crime with which he was charged."

Later on Judge Holtzoff stated:

> "The present tests of the sufficiency of an indictment are that, it must apprise the defendant of the specific offense with which he is charged, and that, it must be sufficiently definite in order that if the defendant is later charged with the same or an included offense, he will be in a position to plead double jeopardy."

The Court below correctly found that the indictment clearly, plainly and simply advised the defendant of the nature of the charge in an adequate manner, enabled him to prepare his defense with regard thereto, and protected him against double jeopardy (T. 51).

Appellant cites a number of old cases decided before the adoption of the new rules. These cases, in so far as they are pertinent, are as archaic as the formal re-

quirements of the common law referred to by Judge Holtzoff.

SPECIFICATION OF ERROR NO. 4.

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY IN ACCORDANCE WITH INSTRUCTIONS NO. 3 AND 4 REQUESTED BY APPELLANT AS TO THE MEANING OF THE WORD "ENDEAVOR" AS USED IN THE STATUTE.

United States v. Russell, 255 U.S. 138, contains no authority for the appellant's proposed Instructions Nos. 3 and 4. On the contrary, "Endeavor", as the Supreme Court said at page 143

> "describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. * * * The section, however, is not directed at success in corrupting a juror, but at the 'endeavor' to do so. Experimental approaches to corruption of a juror are the 'endeavor' of the section."

In that case it was emphasized that the "endeavor", not the corruption—there of a juror—was the gist of the offense, and hence that "experimental approaches" toward offering a juror a bribe, in the shape of inquiries, made of his wife before he had been selected or sworn, concerning his attitude toward the accused, constituted the offense. See *United States v. Polakoff,* 2 Cir. 1941, 121 F. 2d 333, 334.

The instruction given to the jury as to the meaning of "endeavor" was correct, accurate and complete (T. 172-173).

SPECIFICATION OF ERROR NO. 5.

THE COURT CORRECTLY REFUSED TO INSTRUCT THE JURY IN ACCORDANCE WITH APPELLANT'S REQUESTED INSTRUCTION NO. 2.

The trial Court instructed the jury clearly and fully as to the necessary elements of the crime charged. The jury was correctly and fully instructed as to the meaning of the word "corruptly" as used in the statute, and as to its applicability in the case which it had pending before it (T. 170, 178, 180, 183-186). The Court correctly refused to give Defendant's Requested Instruction No. 2 for this proposed instruction would have the jury believe that it was necessary for the prosecution to prove that defendant's *purpose* was corrupt when he spoke to the juror Peneku.

Whether there can or cannot be a criminal intent without a motive is immaterial. What is material and here pertinent is that it was not necessary for the jury to find that appellant had any corrupt motive or purpose. With a most laudable motive or purpose one can corruptly endeavor to influence, obstruct and impede the due adminstration of justice in violation of 18 U.S.C. § 1503, and with the evidence of such endeavor being clear, as it was here, the question of motive becomes unimportant and in fact immaterial.

CONCLUSION.

It is respectfully submitted that appellant was properly convicted and that the judgment of the trial Court should be affirmed.

Dated, Honolulu, T.H.,
May 17, 1954.

Respectfully submitted,

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District of Hawaii,

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No. 14,086

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN KONG, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

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Appellee.

On Appeal from the United States District Court for the Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

SPECIFICATION OF ERROR NO. 1.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND THAT DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL.

It is respectfully submitted in reply to appellee's statement on page 5 of its brief that the placing of indictment against appellant on the secret file "was done, not for personal reasons of the United States attorney, but at the behest and on the recommendation of the judge who was then trying" another case is not consonant with what occurred when he made the request for secrecy. All that took place at that time is

set forth on pages 4 and 5 of the Record. He made no reference to any command, mandate, or injunction (which appellant apprehends is the definition of the term "behest" used by appellee in this connection) nor even to a "recommendation" by another judge. To the contrary the United States Attorney based his request solely (as he phrased it) "in order that the government can never be accused of creating a climate that may be prejudicial to any of the defendants" then on trial (later convicted) of a violation of the Smith Act.

In reply to the contention that the right to a speedy trial is not absolute but only relative, it is respectfully submitted that all that is relative about the Sixth Amendment is the rate of speed with which an accused is brought to trial after being taken into custody. The relativity is limited to incidents peculiar to a given defendant, but his right cannot be taken from him, as was done in this case,—not because of an equal right guaranteed him nor because of a superior right guaranteed by the Constitution to another,—but because, forsooth, the prosecutor anticipated that a group of Communists then on trial, or perhaps their fellow-travelers, might falsely accuse the government acting through him "of creating a climate prejudicial to them".

The true significance of *Beavers v. Haubert,* 198 U.S. 77, cited on page 3 of appellee's brief on the subject of the right to a speedy trial becomes readily apparent upon reading all that the Court had to say on

the point. We respectfully submit it does not support the peremptory effect claimed for it.

In the belief that it will prove helpful the complete language of the Court is here set out.

> Undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the Constitution, but suppose he is charged with more than one crime, to which does the right attach? He may be guilty of none of them, he may be guilty of all. He cannot be tried for all at the same time, and his rights must be considered with regard to the practical administration of justice. To what offense does the right of the defendant attach? To that which was first charged or to that which was first committed? Or may the degree of the crimes be considered? Appellant seems to contend that right attaches and becomes fixed to the first accusation and whatever be the demands of public justice they must wait. We do not think the right is so unqualified and absolute. If it is of that character it determines the order of trial of indictments in the same court. Counsel would not so contend at the oral argument, but such manifestly is the consequence. It must be remembered that the right is a constitutional one, and if it has any application to the order of trials of different indictments it must relate to the time of trial, not to the place of trial. The place of trial depends upon other considerations. It must be in the district where the crime was committed. There is no other injunction or condition and *it cannot be complicated by rights having no connection with it.* (Emphasis added.)

> The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrests for other offenses; and removal proceedings are but process for arrest,—means of bringing a defendant to trial.

It is difficult (for appellant, at least) to relate appellee's reference to *Delaney v. United States,* 1 Cir. 1952, 199 F. 2d 107, as support for its contention that individual constitutional rights of a defendant in one case are to be balanced against the constitutional rights of other defendants and the scales weighted "in the judgment of the prosecuting branch of our government". This the trial Court tried to do in the *Delaney* case by refusing to grant

> "a continuance of the trial for a longer period, until such time as it could be estimated with greater assurance that the prejudicial effect of the aforesaid publicity in the newspapers and magazines, over the radio and on television, had so far worn off that the trial could proceed free of the enveloping atmosphere and public preconception of guilt prevalent on January 3, 1952, when appellant was brought to trial."

In the case of *United States v. Rosenberg,* 2 Cir. 1952, 200 F. 2d 666 cited by appellee in opposition to appellant's contention that the guarantee under the Sixth Amendment to the Constitution of the United States to "enjoy the right to a speedy trial" was de-

nied him, the Court did not "score the United States Attorney" for simply procuring an indictment in the due course of his duties. An examination of the language used by Chief Judge Swan discloses that what he referred to as "tactics (which) cannot be too severely condemned" was the United States Attorney's procuring a perjury indictment of a person whom he had expected to use in a case then on trial and publicizing the fact.

The question for decision was not one of constitutional law, but whether an order dismissing appellants' petitions under Title 28, U.S.C.A., Section 2255 that they be released from imprisonment was proper. The Court held that such a petition cannot "be used to obtain a retrial according to procedure which the petitioners voluntarily discarded and waived at the trial upon which he was convicted".

The other cases cited by appellee, not otherwise commented upon in this reply brief, are *United States v. McWilliams,* App. D.C. 1947, 163 F. 2d 695 and *United States v. Holmes,* 3 Cir. 1948, 168 F. 2d 888.

The quotation in the first of these is from a dissenting opinion of Associate Justice Edgerton.

The *Holmes* case, like all other cases on this point which have come to appellant's attention whether as a result of his own research or of citation in appellee's brief was not a case in which the defendants invoked their constitutional rights at the first opportunity or at all promptly. We have found no case which, like the instant appeal, involves placing an in-

dictment on the secret file for other than the well known reasons for so doing, and contemplated by Federal Rules of Criminal Procedure, namely, to prevent flight.

Dated, Honolulu, Hawaii,
June 14, 1954.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellant.

No. 14088.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES T. LESTER, Administrator of the Estate of Harold Hugh Enfield,

Appellant,

vs.

NATIONAL BROADCASTING COMPANY, INC., PHILIP MORRIS & COMPANY, LTD., INC., and THE BIOW COMPANY, INC.,

Appellees.

APPELLEES' BRIEF.

Appeal From the United States District Court for the Southern District of California, Central Division.
(Mathes, D. J.)

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IN THE

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FOR THE NINTH CIRCUIT

CHARLES T. LESTER, Administrator of the Estate of Harold Hugh Enfield,

Appellant,

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NATIONAL BROADCASTING COMPANY, INC., PHILIP MORRIS & COMPANY, LTD., INC., and THE BIOW COMPANY, INC.,

Appellees.

APPELLEES' BRIEF.

Jurisdictional Statement.

The present action is to vacate a judgment of the United States District Court, Southern District of California. Accordingly, that court had jurisdiction (*Lacassagne v. Chapuis,* 144 U. S. 119, 126).

The judgment herein was entered July 31, 1953 [R. 78, line 22]. The notice of appeal was filed August 28, 1953 [R. 79]. This court has jurisdiction under Section 1291 of Title 28, U. S. C.

Opinion Below.

The court below did not write an opinion. Agreeable to its local rule, Findings of Fact [R. 75, line 3, to 76, line 10] and Conclusions of Law [R. 76, lines 13-21] were signed by District Judge Mathes and filed.

(Because this case involves judgments and orders made by the late District Judge J. F. T. O'Connor and Judges Yankwich, Weinberger and Mathes, it will be necessary for us to mention the judges by name.)

Summary Statement.

Appellant, as administrator of the estate of Harold H. Enfield, deceased, brought this action to vacate and set aside a certain judgment against his intestate and in favor of appellees given by the late District Judge J. F. T. O'Connor in an action then pending in the Court below, entitled *"Enfield, et al. v. The Biow Company, Inc., et al.,"* No. 4616 in the files of said Court.

Similar relief was asked by petition and motions in said action 4616 and was denied by Judge Yankwich (now Chief Judge) on the merits and with prejudice [R. 106-107, 110]. Appellant's intestate, having moved to set aside Judge Yankwich's orders upon the ground that the case had not been properly transferred to him, later, in open court, retracted his application and was permitted by Judge Yankwich to withdraw his motion [R. 121].

In 1948 appellant's intestate brought a plenary action in the Court below entitled *"Enfield v. The Biow Company, Inc., et al.,"* No. 8288 in the files of the District Court for the same relief and upon the same grounds [R. 30-43]. A motion by the present appellees, defendants therein, for a summary judgment in their favor because of the bar of Judge Yankwich's orders, was

granted by Judge Weinberger, and a summary judgment entered [R. 57-58]. Appellant's intestate thereupon took an appeal to this Court (No. 12223) [R. 59]. Appellant's intestate failed to file his record, the appeal on motion was dismissed by this Court and in 1949 the mandate was filed in the Court below [R. 60-62].

In 1953, five years after the case was filed before Judge Weinberger and seven years after Judge O'Connor gave the judgment sought to be set aside, appellant brought the present action for the same relief and on the same claim [R. 2-22]. Appellees made a motion for a summary judgment upon the ground that Judge Yankwich's orders in 4616 and Judge Weinberger's judgment in No. 8288 were *res judicata* [R. 26-62]. Judge Mathes granted the motion [R. 73] and gave judgment for appellees [R. 77-78] from which appellant has appealed [R. 79].

In stating the case we shall follow as nearly as possible a strict chronological presentation of the facts.

Statement of the Case.

Proceedings Before Judge O'Connor in Action 4616.

On July 11, 1945, appellant's intestate commenced action No. 4616 against appellees [R. 4, line 14]. Trial was had and at the conclusion of the plaintiff's case, defendants therein, appellees herein, moved for a directed verdict on eight grounds and the motion was granted by Judge O'Connor on all eight grounds [R. 5, lines 4-8]. Judgment was entered on January 25, 1946 [R. 5, lines 8-13] and a new trial was thereafter denied.

On March 22, 1946, appellant's intestate filed a petition in action 4616 to vacate the judgment therein [R.

86-92] and at the same time filed an Affidavit of Prejudice against Judge O'Connor [R. 93-99].

In the affidavit of prejudice plaintiff's intestate alleged that affiant believed that Judge O'Connor

> "has a personal bias and prejudice in favor of The Biow Company, Incorporated, Philip Morris and Company, Ltd., Inc., and National Broadcasting Company, Inc., opposing parties * * *." [R. 93, lines 9-16].

Affiant gave as a reason for such belief that the complaint in action No. 4616 was for the alleged plagiarism of a radio program; that Judge O'Connor was the owner of seventy-five shares of the stock of Radio Station KMTR (not a party to the suit); that the law of radio was comparatively new; that there were comparatively few radio stations in the United States and that all court decisions respecting liability of radio stations were naturally followed closely by all stations as a guide in the running of their affairs [R. 96, lines 10-20].

The petition to vacate judgment filed the same day was based primarily on the same allegations. It averred that Judge O'Connor was disqualified from sitting in the trial on the cause in question under Section 20 of the Judicial Code [R. 88, lines 20-22].

On March 22, 1946, appellant's intestate served a notice of motion based on said petition

> "for an order vacating and setting aside the judgment entered herein on January 25, 1946, granting judgment for the defendants, on the ground same is void and for such other and further and different relief as to the Court may seem just and proper." [R. 100, lines 13-17].

Thereupon Judges Yankwich and O'Connor signed a written order transferring the cause to Judge Yankwich [R. 51].

Proceedings Before Judge Yankwich in Action 4616.

Defendants served and filed their answer to said petition, also the affidavit of Judge O'Connor and an affidavit of Frank P. Doherty, Esq. On April 1, 1946, said petition and motion came on regularly for hearing before Judge Yankwich, who, on April 11, 1946, signed findings of fact and conclusions of law directing that the petition to vacate the judgment and petition and motion, and all relief thereunder, or under either of them, "be denied on the merits and with prejudice" [R. 105, line 7].

Paragraphs 2 and 3 of the findings read as follows:

> "2. The averment of the affidavit of prejudice made and filed by plaintiff herein on March 22, 1946, that said Honorable J. F. T. O'Connor has a personal bias and prejudice in favor of the defendants herein, is untrue. Said Judge O'Connor did not have any bias or prejudice against or in favor of any of the parties to this action.
>
> "3. Neither KMTR Radio Corporation nor said Judge O'Connor was or is a party to the above entitled action, nor interested therein or in the outcome thereof, directly or indirectly. No one of defendants' alleged infringing programs was broadcast over Radio Station KMTR, and said radio station was and is not in any way connected with the present litigation. Radio Station KMTR is not affiliated with defendant, National Broadcasting Company, Inc., as a member of its network or otherwise." [R. 104, lines 7-21.]

The same day an order was made in accordance with the conclusions of law [R. 106-107].

On June 4, 1946, the appellant's intestate filed a second motion for an order vacating the judgment in action No. 4616 and the order denying the motion for new trial on the ground that the judgment and order were void [R. 108, lines 18-23]. This motion was made upon the theory that Judge O'Connor, by joining with Judge Yankwich in transferring cause No. 4616 to Judge Yankwich, had thereby judicially determined that he was disqualified. Judge Yankwich found that this was not true and concluded that the motion should be denied on the merits and with prejudice [R. 110, lines 15-19] and ordered that it be so denied.

In accordance with local rule 7, the form of this order was submitted to Jesse A. Levinson, the attorney for appellant's intestate, the plaintiff therein. He objected to the fact that the form of order provided that the motion was denied on the merits and with prejudice [R. 111, lines 16-21]. On June 19, 1946, Judge Yankwich considered this objection and overruled the same [R. 111, lines 22-24], and on June 20, the order was signed [R. 110, line 25].

On June 21, 1946, appellant's intestate filed a motion to vacate the proceedings before Judge Yankwich [R. 112-113] on the ground that the procedure prescribed by Section 21 of the United States Judicial Code for the designation or choosing of another judge was not followed [R. 112, lines 19-24]. It appears, however, from counsel's argument at the hearing on July 1, 1946 [R. 115, lines 3-6] that his principal ground was that the order transferring the cause from Judge O'Connor to Judge Yankwich was signed by Judges Yankwich and O'Connor,

but was not signed by Judge McCormick, the Senior Judge, and that, therefore, the transfer was not made in accordance with local rule 2(a). Judge Yankwich thereupon made a statement for the record that "not only did Judge McCormick approve this, but the transfer was made in his office with the three of us present" [R. 115, lines 18-19]. Thereupon, the attorney for appellant's intestate (the attorney for appellant herein) stated in open court that in view of the fact that Judge Yankwich had informed him that Judge McCormick did approve the transfer in the presence of Judges Yankwich and O'Connor, his application was withdrawn, unless Judge Yankwich preferred to deny it [R. 120, lines 21-25]. Counsel for defendants, appellees herein, asked that it be denied with prejudice [R. 121, lines 3-4]. Judge Yankwich, nevertheless, gave force to the retraxit of appellant's intestate and permitted counsel to withdraw the motion [R. 121, lines 5-6].

Proceedings Before Judge Weinberger in Action No. 8288.

On June 8, 1948, appellant's intestate filed a new complaint (action No. 8288) to set aside the judgment in action No. 4616 [R. 30-51]. To this complaint there were attached two exhibits: Exhibit A, the affidavit of prejudice [R. 44-50], and Exhibit B, the order transferring the action No. 4616 to Judge Yankwich [R. 51], both of which have heretofore been referred to in their chronological order.

Five causes of action were attempted to be stated: The first cause of action set out Judge O'Connor's ownership of seventy-five shares of stock of Radio Station KMTR and alleged that the judgment was void because of Judge O'Connor's disqualification. In the second cause

of action, plaintiff's intestate referred to the affidavit of prejudice against Judge O'Connor, averred that Judge O'Connor recused himself and joined with Judge Yankwich in transferring the matter to Judge Yankwich for hearing and determination. He further alleged that Judge O'Connor had judicially determined and ruled that he was disqualified [R. 38, lines 17-19]. For a third cause of action [R. 38-41], he pleaded the failure of Senior Judge McCormick to sign the order of transfer—the very matter which his counsel in open court had withdrawn two years previous. For a fourth cause of action [R. 41] he averred that the clerk did not reassign cause No. 4616 to another judge pursuant to the local rules. For a fifth cause of action [R. 41-42] his claim was that Judge O'Connor did not certify to the Senior Circuit Judge of this circuit an authenticated copy of his order of disqualification. In his prayer he prayed for a judgment and decree of this court vacating and setting aside the judgment in No. 4616 and declaring the same to be void and of no force and effect and for a judgment and decree of this court vacating and setting aside all orders made by Judge Yankwich and for general relief [R. 42, line 20, to R. 43, line 6].

On June 26, 1948, appellees herein, defendants in action No. 8288, filed a motion for summary judgment or in the alternative to dismiss on the ground that the orders made by Judge Yankwich in action No. 4616 constituted a bar to the action [R. 52-56].

On July 19, 1948, the matter came on before Judge Weinberger, who thereupon entered summary judgment for defendants [R. 57-58]. The court found that there was no genuine issue as to any material fact and no controversial question of fact to be submitted to the trial

court and concluded that defendants were entitled to judgement as a matter of law and adjudged that plaintiff take nothing by his action and that defendants be hence dismissed with their costs and disbursements therein expended [R. 58, lines 10-17].

On August 17, 1948, appellant's intestate appealed to this Court [R. 59]. The records of this Court, then undocketed but possibly now filed under No. 12223, disclose that appellant's intestate, having been denied by Judge Weinberger the right to appeal *in forma pauperis,* petitioned this Court for leave so to appeal, which was denied. Thereupon, he asked the Supreme Court of the United States for leave to petition for certiorari, and this was denied on March 28, 1949 (*Enfield v. Biow,* 336 U. S. 934). On April 25, 1949, the mandate of this Court was filed below [R. 60-62], and another stage of this litigation came to an end.

Proceedings Before Judge Mathes in No. 15612 (the Present Action).

On June 15, 1953, appellant, as Administrator of the Estate of Harold H. Enfield, deceased, filed a complaint [R. 2-22] to vacate and set aside Judge O'Connor's judgment and for general relief. The complaint contains many paragraphs of extraneous and entirely immaterial matters. Omitting formal allegations and those which are plainly irrelevant and immaterial we have the following allegations: Paragraph XI alleges that Judge O'Connor, at the time he presided, was the owner of seventy-five shares of the capital stock of KMTR Radio Corporation [R. 6]. Then follows three paragraphs—XII, XIII and XIV—setting out the business of appellees [R. 6 and 7]. The filing by appellant's intestate of a motion

to vacate the judgment on the ground of Judge O'Connor's disqualification [Par. XV, R. 7], and the filing of the affidavit of prejudice [Par. XVI, R. 7-8] are alleged. In Paragraph XVII the complaint alleges that the basis of the affidavit of prejudice was to the effect that Judge O'Connor was disqualified [Par. XVII, R. 8]. However, since a copy of the affidavit is in the record [R. 44-49; 93-99] the affidavit speaks for itself. Paragraphs XVIII to XX [R. 8 and 9] alleged that the Senior Judge did not approve in writing the order transferring Cause No. 4616 from Judge O'Connor to Judge Yankwich. Paragraphs XXI to XXXXIV [R. 9-13] all have to do with the sale of seventy-five shares of stock of the Radio Corporation to Judge O'Connor by Katherine Banning and her present situation. Appellant attempts to tie these allegations into the case by the further allegation that they were not known to plaintiff's intestate at the time of filing the affidavit of prejudice [R. 13, lines 3-5].

In Paragraph XXXI it is alleged that Judge O'Connor, at the time of the trial, was a close and intimate friend of Louis B. Mayer, a producer of motion pictures, and had been a close and intimate friend of Mayer's for a period of many years [R. 13]; that at parties given by said Louis B. Mayer, Judge O'Connor was often conspicuous as a guest and occasionally acted as master of ceremonies, and was often seen in the company of said Louis B. Mayer and Ginny Simms, star of appellees' radio show; that all of this was before and at the time of the trial of action No. 4616 before Judge O'Connor [Par. XXXII, R. 13]. It is further alleged that at the time of the trial, Louis B. Mayer was a close friend of Miss Ginny Simms, all of which was well known to Judge O'Connor [Par. XXXIII, R. 14]. In Paragraph

XXXIV there appears the allegation which appellant asserts is "the gravamen of plaintiff's complaint" (Br. p. 18, line 24). Upon information and belief, appellant alleges that:

> "as a result of pressure and undue influence, and otherwise, brought by said Louis B. Mayer upon said Judge J. F. T. O'Connor during and before the trial of the aforementioned cause No. *4161* O'C, plaintiff's intestate did not receive a fair, just and equitable trial in the aforementioned litigation, in that said Louis B. Mayer sought and received from said J. F. T. O'Connor, Judicial favor from said trial judge in relation to his decisions and rulings in favor of the defendants named in said cause of action. All of which, because of the close friendship of many years standing between said Louis B. Mayer and said Judge J. F. T. O'Connor, and the close friendship then existing between said Mayer and Miss Ginny Simms, star of defendant's radio show." [R. 14, lines 7-20.]

In Paragraph XXXVI it is alleged that plaintiff's intestate was unemployed in his chosen profession as an actor and was unable to prosecute the appeal from the judgment in action No. 4616. In Paragraph XXXVII it is alleged that plaintiff's intestate learned of the close friendship between Louis B. Mayer and Judge O'Connor and the close friendship between Miss Ginny Simms and Louis B. Mayer and decided to take action which "might be characterized as of a drastic nature in regard to the integrity of the Judgment in cause No. 4616 O'C * * *" [R. 16, lines 1-3].

Paragraphs XXXVIII to XXXXIX, inclusive [R. 16-20] go into unintelligible detail as to some family

quarrel concerning the administration of intestate's estate—a matter without the slightest relevancy whatever to this cause of action. Paragraphs L and LI [pp. 20-21] have to do with defendant Underwriters at Lloyds, London, who was not served and is not an appellee in this action. Paragraphs LII and LIII deal with that portion of the judgment which awarded costs and collection thereof after judgment. The prayer is that the judgment in action No. 4616 be vacated and set aside, that the judgment for costs be vacated and set aside, and that recovery in the amount thereof be had from defendant Underwriters at Lloyds, London [R. 22].

On July 9, appellees filed a motion for a summary judgment in their favor or in the alternative to dismiss the action on the ground that the complaint does not state a claim against them [R. 26-62]. The matter was noticed for hearing before Judge Mathes on July 20, 1953 [R. 29, line 7]. On July 31, 1953, Judge Mathes made an order granting the motion for summary judgment [R. 73] and signed and filed Findings of Fact and Conclusions of Law [R. 74-75].

The Findings of Fact find: that appellant's intestate filed the petition and motion in action No. 4616, on March 22, 1946, for the same relief asked for herein; that the Court on April 11, 1946, denied said petition and motion on the merits and with prejudice; that a second motion was made by plaintiff's intestate on June 3, 1946, in said action No. 4616, for the same relief; that the Court made an order denying said motion on the merits and with prejudice; that no appeal was taken from either of the orders and that they have long since become final; that plaintiff's intestate commenced action No. 8288 for

the same relief plaintiff is seeking herein; that judgment was entered therein that plaintiff take nothing by his action; that plaintiff took an appeal from said judgment to this Court, which dismissed said appeal and that all of the matters therein found are disclosed in the records of the Court and cannot be the subject of controversy [R. 75-76]. As Conclusions of Law the Court concluded that the order entered April 11, 1946, and the order filed June 20, 1946, both in said action No. 4616, and said judgment entered July 19, 1948, in action No. 8288, each constituted an absolute and conclusive bar against plaintiff's maintaining the action [R. 76].

The same day the Court entered a summary judgment for defendants that plaintiff take nothing by his action and that defendants recover costs taxed at $41.00 [R. 77-78]. From this judgment appellant has prosecuted this appeal [R. 79].

Questions Presented by This Appeal and Summary of the Argument.

There are two questions presented by this appeal.

The first question is whether the orders made by Judge Yankwich in action No. 4616 and the judgment made by Judge Weinberger in action No. 8288 are *res judicata* as to the present action.

The second question is whether the charges contained in the complaint are of sufficient substance to state a justiciable controversy.

In respect to the first question, it is our contention (a) that what is now asserted by appellant, namely that his intestate did not receive a fair, just and equitable

trial from Judge O'Connor because Judge O'Connor was a friend of Louis B. Mayer, who was a friend of Ginny Simms, who was the star of appellees' radio show, is nothing more than a reiteration of the claim first made by appellant's intestate in his affidavit of prejudice [R. 92, lines 14-17] annexed also as Exhibit A to the complaint in action No. 8288 [R. 44, line 25, to R. 45, line 2]; and (b) that Judge Yankwich's order in No. 4616 of April 11, 1946 [R. 106-107], made upon his finding that

> "Said Judge O'Connor did not have any bias or prejudice against or in favor of any of the parties to his action" [R. 104, lines 10-12]

and the judgment of Judge Weinberger in No. 8288 denying appellant's intestate any relief are conclusive bars to appellant's present action.

In respect to the second question, it is our contention that the charges in the complaint are flimsy and transparent and insufficient to state a justiciable controversy.

Specifically we shall urge:

(1) Where the relief sought, the parties, and the causes of action are the same, the prior orders or judgment are an absolute bar to the subsequent action. Judge Yankwich's orders in action No. 4616 and Judge Weinberger's judgment in action No. 8288 are *res judicata* as a bar against plaintiff's claim.

(2) The charges contained in the complaint are so flimsy and transparent as to be insufficient to state a justiciable controversy.

We shall argue the points in the order stated.

ARGUMENT.

I.

Where the Relief Sought, the Parties, and the Causes of Action Are the Same, the Prior Orders or Judgment Are an Absolute Bar to the Subsequent Action. Judge Yankwich's Orders in Action No. 4616 and Judge Weinberger's Judgment in Action No. 8288 Are Res Judicata as a Bar Against Plaintiff's Claim.

Cromwell v. County of Sac, 94 U. S. 351;

United States v. California and Oregon Land Co., 192 U. S. 355;

Baltimore S. S. Co. v. Phillips, 274 U. S. 316.

The California law is the same:

Olwell v. Hopkins, 28 Cal. 2d 147, 152, 168 P. 2d 972;

Krier v. Krier, 28 Cal. 2d 841, 843, 172 P. 2d 681.

In *Cromwell v. County of Sac, supra,* 94 U. S. 351, the Supreme Court held that a prior judgment against plaintiff that he had not given value for certain of defendant's bonds was not *res judicata* against him on other bonds of the same defendant. The Court stated the rule of law governing the doctrine of *res judicata* so clearly that its language has become the accepted rule. The Court said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and

its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

94 U. S. 352-353.

In *United States v. California and Oregon Land Co., supra,* 192 U. S. 355, the United States brought an action against the land company claiming title and praying that certain patents under which the land company claimed be declared void. On March 29, 1893, a final decree was entered finding the facts to be as alleged by the land company including the allegation that the land company was a bona fide purchaser for value and dismissing the bill on that ground. Thereafter, the United States brought the present action praying, as in the previous action, that the patents to the same land be declared void. The land company's plea of the former adjudication was held to be bad and the trial court entered a decree declaring the

patents void. Mr. Justice Holmes, in delivering the opinion of the Supreme Court reversing the judgment in favor of the government, said:

> "On the general principles of our law it is tolerably plain that the decree in the suit under the foregoing statute, would be a bar. The parties, the subject matter and the relief sought all were the same. It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself—here it sues on behalf of the Indians. But that is not true in any sense having legal significance. * * * The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee."
>
> 192 U. S. 357-358.

In the previous action involved in *Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, libellant Phillips was denied full indemnity by way of damages and was awarded the sum of $500.00 as the costs of maintenance and cure and this amount was paid and the decree satisfied. (*Phillips v. United States,* 266 Fed. 631.) In that action, the libellant had sued for damages on account of *defective appliances.* Thereafter, he brought the present action on the ground that it was the *negligent operation of the appliances* which caused his injury. A verdict was rendered for Phillips and the Court of Appeals affirmed

upon the ground that the second action was based upon a different cause of action. (*Baltimore S. S. Co. v. Phillips,* 9 F. 2d 902.) On certiorari the Supreme Court reversed. The Court said:

> "Here the court below concluded that the cause of action set up in the second case was not the same as that alleged in the first, because the grounds of negligence pleaded were distinct and different in character, the ground alleged in the first case being the use of defective appliances and, in the second, the negligent operation of the appliances by the officers and co-employees. Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The *thing,* therefore, which in contempla-

tion of law as its *cause,* becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*" ' *Chobanian v. Washburn Wire Company,* 33 R. I. 289, 302.

"The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury."

274 U. S. 321-322.

It will be observed that the foregoing authorities emphasize the identity of the parties, the identity of the relief asked for, and the identity of the cause of action of the prior action with those of the subsequent action. These three identities are present in the case at bar.

1. The parties are the same. Appellant is in privity with his intestate. (*Fouke v. Schenewerk* (C. A. 5th), 197 F. 2d 234, 236; *Rochford v. Atkins,* 213 Mass. 368, 100 N. E. 669, 670.) The defendants in actions No. 4616 and No. 8288 are the appellees herein.

2. The relief in the two prior actions is identical with the relief asked for in the present complaint, as the following references to the record will demonstrate:

Motion of Appellant's intestate filed in 4616 on March 2, 1946 [R. 100, lines 13-17].

Paragraph 1 of the prayer of the complaint in 8288 [R. 42, line 20, to R. 43, line 1].

Paragraph 1 of the prayer of the complaint in the case at bar [R. 22, lines 7-14].

The second paragraph in the prayer of the complaint herein [R. 22, lines 15-21] asks that judgment for costs in 4616 be vacated and that recovery be had against a defendant not served and not appellee herein. The judgment for costs is an inseparable, although incidental, part of the judgment on the directed verdict, and if the judgment itself is not set aside, the portion thereof which awarded costs is not affected.

3. The causes of action are identical.

We may assume for the purpose of the argument that so far as the trial of the issues in action No. 4616 is concerned appellant's intestate had a single primary right, namely, that of having his cause determined by a judge who was not disqualified. If Judge O'Connor were disqualified either by bias, by prejudice, by interest or by relationship, then it may be assumed for the purposes of the argument that appellant's intestate had suffered a wrongful invasion of his right (not however by appellees) and, if application were timely made, the Court would vacate and set aside Judge O'Connor's judgment. But any alleged invasion of the right of appellant's intestate was a single wrongful invasion whether the acts constituting the wrongful invasion were one or many, simple or complex—whether the disqualifiation arose because of bias, or prejudice, or interest, or relationship, or any other cause of disqualification.

Appellant's intestate originally alleged the disqualification of Judge O'Connor on the grounds of bias and prejudice and interest, consisting of ownership of shares of stock of another radio station. Appellant, his administrator, has repeated these charges in the complaint in the present action elaborating on the alleged wrong by con-

tending that Judge O'Connor was disqualified under the theory of "guilt by association"—once removed.

The circumstance that in the present action an additional charge has been made does not prevent the former orders and judgment from being *res judicata* as a bar. Assuming these new charges rise to the dignity of allegations of fact, even so,

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."
>
> *Baltimore S. S. Co. v. Phillips,* 274 U. S. 321, quoted at length *supra.*

Since the three identities, namely, parties, relief and cause of action are present it necessarily follows that Judge Yankwich's orders and Judge Weinberger's judgment are *res judicata* as a bar to this action.

The cases cited by appellant (Br. pp. 15-18) do not support his contentions. The language quoted from *United States v. International Building Co.,* 345 U. S. 502, clearly shows that the Court was speaking about a second action "upon a different claim or demand" (345 U. S. 504). The language quoted by appellant from *Cromwell v. County of Sac, supra,* 94 U. S. 351 (Br. p. 16), deals with a "different demand" (94 U. S. 356). In the case of *The Haytian Republic,* 154 U. S. 118, 128 (Br. p. 16), the Supreme Court held that merely because the same relief, namely, the forfeiture of a vessel, was asked for in two actions, was not sufficient to support the plea of a pending suit in the second action. In one suit, forfeiture of the vessel was sought because of the

smuggling of narcotics and the importation of Chinese at different places and on certain days and in the second suit because of the smuggling of other lots of narcotics and importing of other Chinese in other places and at other times.

In *De Sollar v. Hanscome,* 158 U. S. 216, the former action had been brought by the present defendant against the present plaintiff and, of course, the judgment could not be *res judicata as a bar* for the causes of action were necessarily different. The statement of the Court, correctly paraphrased in the brief at page 17, is a correct statement of the law of *res judicata* when, because the causes of action are different, the former adjudication is not a bar, but the matters actually decided raised an estoppel. Even if we assume that the cause of action or claim in the complaint herein is different from the cause of action in No. 4616 and No. 8288 Judge Yankwich's orders are *res judicata* as an estoppel that Judge O'Connor was not disqualified by bias, prejudice or stock interest in another radio station.

In *Baker v. Moody* (C. A. 5th), 204 F. 2d 918, one suit was brought by plaintiff in contract on one tract of land, and another suit was in tort on another tract of land. The Court of Appeals properly held there was no room for the application of the doctrine of *res judicata.*

Section 1911 of the Code of Civil Procedure of the State of California and the California cases cited by appellant in his brief, page 18, all have to do with the other phase of the doctrine of *res judicata,* namely, estoppel not as a bar, but as evidence where the causes of action are different.

II.

The Charges Contained in the Complaint Are so Flimsy and Transparent as to Be Insufficient to State a Justiciable Controversy.

Appellant asserts that the gravamen of plaintiff's complaint is found in Paragraph XXXIV. He says other allegations in the complaint are:

> "surrounding and lead up to and are part of a story in support of the claim of plaintiff" (Br. p. 18, line 24, to p. 19, line 1).

Paragraph XXXIV, upon which appellant relies so strongly, is quoted in the statement of the case, *supra,* page 11. The charge is that

> "plaintiff's intestate did not receive a fair, just and equitable trial in the aforementioned litigation" [R. 14, lines 10-12].

It is asserted that this was

> "a result of pressure and undue influence and otherwise brought by said Louis B. Mayer upon said Judge J. F. T. O'Connor during and before the trial of the aforementioned cause" [R. 14, lines 7-10].

This pressure is elaborated later in the paragraph by the statement:

> "in that said Louis B. Mayer sought and received from said J. F. T. O'Connor, Judicial favor from said trial judge in relation to his decisions and rulings in favor of the defendants named in said cause of action" [R. 14, lines 12-16].

The reason why Louis B. Mayer was able to exert pressure and undue influence upon Judge O'Connor and receive judicial favor from Judge O'Connor was:

> "because of the close friendship of many years standing between said Louis B. Mayer and said Judge J. F. T. O'Connor, and the close friendship then existing between said Mayer and Miss Ginny Simms, star of defendant's radio show" [R. 14, lines 16-20].

Apart from any application of the doctrine of *res judicata,* the complaint fails to state a claim upon which relief may be had. It will be recalled that Judge O'Connor's judgment, here sought to be set aside, was entered upon a directed verdict in favor of appellees on all eight grounds urged by appellees. The action of a trial court in directing a verdict does not raise any question of fact, but simply questions of law. If appellant's intestate had taken an appeal to this Court and if, as is now claimed, he did not receive a fair, just and equitable trial, the judgment would have been speedily reversed by this Court. Appellant is attempting to have Judge O'Connor's judgment set aside for errors which could have been corrected on appeal. The complaint attempts to excuse appellant's intestate for his failure to take the appeal because of the expense involved [Par. XXXVI, R. 14, lines 5-17] but this does not excuse appellant's intestate, or permit him or his administrator to relitigate the law suit.

Moreover, appellant's charge that "his intestate did not receive a fair, just and equitable trial" before Judge O'Connor is a mere conclusion of law. The charge that this was the result of pressure and undue influence is likewise a conclusion of law.

When appellant attempts to support these conclusions of law by the allegations of the close friendship between Louis B. Mayer and Judge O'Connor and the close friendship between Mr. Mayer and Miss Ginny Simms, star of defendant's radio show, these allegations of fact are so flimsy and transparent that they do not state a justiciable controversy.

The charge against Judge O'Connor is not substantially different from the charge made by the Sabins against the judge of the state trial court, who had foreclosed a mortgage of the Home Owners' Loan Corporation. The charge is considered in *Sabin v. Home Owners' Loan Corporation* (C. C. A. 10th), 151 F. 2d 541 (cert. den., 328 U. S. 840).

In the case cited, Home Owners' Loan Corporation brought an action against the Sabins in the state courts of Oklahoma to foreclose a mortgage. A judgment of foreclosure was given, and since the defendants did not give a stay bond the property was sold. Defendants appealed to the Supreme Court of Oklahoma, where it was there affirmed (187 Okla. 504, 105 P. 2d 245). The Sabins moved the state trial court to vacate the judgment because of the trial judge's disqualification. The motion was overruled. Thereafter, the Sabins commenced an action in the Federal District Court to quiet title to and recover possession of the property lost by the foreclosure proceedings. The District Court sustained defendant's motion for summary judgment and plaintiffs appealed. Of the four assignments of error, three had been considered and passed on by the Supreme Court of Oklahoma. As to them, the Circuit Court of Appeals said the summary judgment was properly entered.

The fourth assignment of error was that the judgment of foreclosure was void because of the disqualification of the state trial judge and because of fraud and overreaching. In respect to this assignment of error, the Circuit Court of Appeals said:

> "* * * While the question of the disqualification of the state trial judge has never been presented to an appellate court, it was tendered in the state district court where the judgment was entered by the appellants' motion to vacate the judgment because of the trial judge's alleged disqualification. He overruled the motion and refused to vacate the judgment. No appeal was taken from that ruling and it has long since become final, and the appellants may not litigate it a second time.
>
> "But even aside from that, the motion for summary judgment was nonetheless properly sustained as to this contention. The salutary purpose of Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, is to permit speedy and expeditious disposal of cases where the pleadings do not as a matter of fact present any substantial questions for determination. Flimsy or transparent charges or allegations are insufficient to state a justiciable controvery requiring the submission thereof for trial. The only ground alleged to establish the disqualification of the trial judge was that at the time he considered this case he had a Home Owners' Loan Corporation mortgage on his home which was in default, and that by reason thereof he was overreached by the Home Owners' Loan Corporation. The statement that the trial court was overreached is a mere conclusion and not a statement of fact. This assignment of error does not merit any serious consideration or extended discussion. It is sufficient

to say that the manner in which the foreclosure action was tried by the trial judge was the issue in the appeal to the Oklahoma Supreme Court. All the questions now urged as to the admission of evidence or the other rulings of the trial court were urged then. The Supreme Court found no error in the manner in which the trial was conducted, and found that it had been in all respects in conformity with the law of the state. The charge that the trial judge was disqualified because he had a Home Owners' Loan Corporation mortgage which was in default is too gauzy to present a substantial question. The motion for summary judgment was properly sustained."

151 F. 2d 542.

The case of *Sabin v. Home Owners' Loan Corporation, supra,* not only demonstrates that the complaint herein does not state a claim upon which relief can be granted, but it also disposes of appellant's contention (Br. pp. 9-10) that a motion for summary judgment is not proper to test a complaint such as this one.

The case of *Root Refining Company v. Universal Oil Products Co.,* 169 F. 2d 514, cited by appellant (Br. pp. 21-22), has no factual resemblance to the case at bar.

It has been repeatedly said that it is the interest of the republic that there be an end to litigation. If appellant's theory be correct, if his complaint be invulnerable against a motion for summary judgment or to dismiss, the maxim may as well be erased from the books. There are probably very few cases ever decided where the losing party, or his administrator, could not truthfully allege that the trial judge was a friend of a friend of an employee of

the winning party. If, based on this fact, the conclusion of the pleader that the losing party did not receive a fair, just and equitable trial states a justiciable controversy for the vacating of the judgment, then no judgment is safe from attack. It seems patent that the complaint "is too gauzy to present a substantial question" (151 F. 2d 542).

Conclusion.

Judge Yankwich's orders in No. 4616 and Judge Weinberger's judgment in No. 8288 are *res judicata* as a bar to the maintenance of this action. In any event the complaint is insufficient to state a justiciable controversy requiring the submission thereof to trial. Judge Mathes was correct in granting appellees' motion for summary judgment.

We respectfully submit that the judgment should be affirmed.

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No. 14,089

IN THE

United States Court of Appeals

For the Ninth Circuit

MICHAEL CAMPODONICO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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No. 14,089

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APPELLANT'S OPENING BRIEF.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

This is an appeal from a judgment against the appellant in the District Court of the United States for the Northern District of California, sitting without a jury, finding the appellant guilty of violations of 26 U.S.C.A., Section 145(b) (Income Tax Evasion). The charges are in one indictment containing five counts.

The first count charges that "on or about the 9th day of January, 1947, in the Northern District of

California, Northern Division, Michael Campodonico, late of Stockton, California, who during the calendar year 1946 was married, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California at San Francisco, California, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their net income for said calendar year was the sum of $3,814.81 (R. Tr. p. 3, line 15) and that the amount of tax due and owing thereon was the sum of $369.00 (R. Tr. p. 3, line 17), whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $30,720.67 (R. Tr. p. 4, line 2), upon which said net income there was owing to the United States of America an income tax of $12,099.98." (R. Tr. p. 4, line 5).

The second count pleaded in essentially the same language the same offense for the calendar year 1947, except that a separate income tax return was filed by the appellant, computed on the community property basis, wherein his declared income alleged was $3,040.44 (R. Tr. p. 4, line 20), the declared tax he owed was $327.00 (R. Tr. p. 4, line 22), whereas the claimed income was $11,156.42 (R. Tr. p. 4, line 25), and the claimed income tax was $2,564.47 (R. Tr. p. 4, line 27).

The third count pleaded in the same language the same offense for the same calendar year 1947, which he filed on behalf of his wife, computed on a community property basis, wherein he declared her income was $3,040.45 (R. Tr. p. 5, line 14), and the declared tax she owed was $427.00 (R. Tr. p. 5, line 16), whereas the claimed income of appellant's wife was $11,156.43 (R. Tr. p. 5, line 19), and the claimed income tax thereon was $2,744.97 (R. Tr. p. 5, line 21).

The fourth count pleaded in essentially the same language as count one (supra) the same offense for the calendar year 1948, the declared net income alleged was $3,395.43 (R. Tr. p. 6, line 6), the declared tax $205.00 (R. Tr. p. 6, line 8), and the claimed actual income was $5,667.38 (R. Tr. p. 6, line 10), and the claimed tax was $693.52 (R. Tr. p. 6, line 12).

The fifth count was pleaded in the same language for the calendar year 1949, as counts one and four, the declared net income alleged was $4,617.05 (R. Tr. p. 6, line 30), the declared tax $392.00 (R. Tr. p. 6, line 31), and the claimed actual income was $19,190.78 (R. Tr. p. 7, line 1), and the claimed income tax due thereon $5,167.94 (R. Tr. p. 7, line 4).

Upon conclusion of the case of the prosecution, appellant moved the Court for a judgment of acquittal upon the grounds of the insufficiency of the evidence, principally a failure to establish the corpus delicti save and except by extrajudicial statements of the appellant, and an improper application of the so-

called "net worth expenditure" method of proving income tax evasion.

On June 13, 1953, the Court made and entered a judgment under and by which the appellant was found guilty of each of the five counts as charged in the indictment and the pronouncement of judgment was deferred by the Court for the probation officer's presentence investigation.

Before the pronouncement of judgment, and within the time allowed by law, the appellant with leave of Court, filed a motion in arrest of judgment, which after oral argument was denied.

Within the time allowed by law, the appellant moved the Court for a judgment of acquittal and for a new trial upon the grounds now urged on this appeal and others. The motions were all denied except as follows and the appellant received the following sentences:

As to count one, appellant was sentenced to serve eighteen months in a federal prison and fined $5,000.00.

As to count two, no fine was imposed, but appellant was sentenced to serve eighteen months in a federal prison, and the term of imprisonment as to counts one and two run concurrently;

As to count three, no sentence at all was imposed; and

As to counts four and five, the Court granted the motion for acquittal of appellant.

The motion for a new trial as to counts one, two and three were denied.

The United States District Court for the Northern District of California had jurisdiction under the provisions of 26 U.S.C., Section 145(b), and 18 U.S.C., Section 3231.

The United States Court of Appeals for the Ninth Circuit has jurisdiction for this appeal under the provisions of 28 U.S.C.A., Section 1291.

Appellant duly filed his notice of appeal from the foregoing judgment against him within the time prescribed by law; thereafter, and within the time prescribed by law, appellant filed and served his designation of the record to be sent up on appeal, and thereafter, and within the time prescribed by law, appellant filed and served a statement of points upon which appellant intends to rely on appeal.

Thereafter, and within the time prescribed by law, and by order of the United States District Court, the record in this case, including the transcript of all testimony and all exhibits separately and directly certified, was filed with the clerk of this Court, together with a statement of points to be relied upon on appeal.

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

As stated above, the appellant was convicted of income tax evasion, in that he willfully and knowingly filed false and fraudulent income tax returns in each of the years 1947, 1948, and 1949.

THEORY OF THE PROSECUTION.

The prosecution contended that the appellant was a gambler during all of the years covered in the indictment; that during these years (1946-1949), he made large sums of money from gambling which he did not report in his income tax returns, but concealed his wealth because of the illegal operation. (R. Tr. p. 33, lines 1 to 20.)

In order to prove its case, the prosecution called a number of witnesses in an attempt to establish that appellant had certain assets consisting of cash, bonds, real estate, automobiles, boats, and a one-half interest in a liquor store. All of the witnesses called were asked either on direct examination, and/or cross-examination if they had any knowledge of the appellant's gambling winnings, and they all replied they had no such knowledge. They further testified that the appellant did not gamble except in small friendly games.

The prosecution, in order to sustain its theory, then relied entirely on an extrajudicial statement made

to the internal revenue agents, which statement was transcribed and presented to the appellant for his signature. Appellant refused to sign the statement because he advised the agents that it was not the truth. In this statement the appellant stated he had won some money gambling and playing the horses.

As stated above, all of the witnesses called by the prosecution, by their testimony refuted the claim that appellant made any money gambling. Moreover, the internal revenue agents working on the case, in order to corroborate the appellant's statement, made an exhaustive investigation to determine if appellant made any money gambling with negative results.

Then the prosecution, through its agents, attempted to itemize the various expenditures in such a way as to establish that appellant's net worth was substantially increased during each of the years in question.

Upon conclusion of the prosecution's case, appellant moved for a judgment of acquittal upon the grounds hereinabove mentioned. The motion was denied.

THEORY OF APPELLANT.

1. The evidence of both the appellant and the prosecution clearly establishes the fact that the appellant made no money whatsoever from gambling, and that he properly reported all income which he

received from wages and from his one-half interest in a liquor store during the years in question.

2. The evidence of the appellant and the appellee clearly shows that appellant had accumulated a substantial amount of cash prior to the years in question, which was not taken into account by the agents of the Bureau of Internal Revenue called by the appellee to establish a proper beginning net worth.

3. The appellant did not show any substantial understatement of his income for any one of the years in question.

4. That the prosecution could not rely entirely and solely on an extrajudicial statement of appellant upon which to predicate a conviction in view of the appellant's refusal to sign the statement "because it was not the truth", especially so in view of the testimony of the witnesses called by appellee, refuting the incriminating statements in the unsigned statement.

5. The case at bar is not a proper case in which to apply the net worth theory as it did not clearly and accurately establish by competent evidence the net worth of the appellant for any one of the tax years in question, nor did it produce evidence that excluded all possible sources of taxable income from which any increase of net worth and the excess expenditures could have been derived.

6. The Government failed to establish by competent evidence with reasonable certainty pertinent starting items of the net worth statement, particularly the cash on hand on January 1, 1946.

SPECIFICATION OF ERRORS.

The appellant makes the following specifications of errors and states the following points upon which he intends to rely on the appeal:

1. The trial Court erred in denying appellant's motion in arrest of judgment upon the grounds that the Court had lost jurisdiction to pronounce judgment therein in that the appellant had been denied a speedy trial in violation of the Sixth Amendment to the Constitution of the United States.

2. The Court erred in denying appellant's motion for acquittal made at the conclusion of the evidence.

3. The findings and decisions of the Court are contrary to the weight of the evidence.

4. The findings and decisions of the Court are not supported by substantial evidence.

5. The Court erred in admitting the alleged statement of the appellant (Exhibit No. 7) to be introduced in evidence.

6. The Court erred in denying appellant's motion to strike from the record Exhibit No. 7, which purports to be an alleged statement of the appellant which was introduced in evidence.

7. The Court erred in denying the appellant's motion for a new trial.

8. The Court erred in overruling objections by appellant to questions addressed by appellee's attorneys to witnesses, which questions related to the extra-

judicial admissions claimed to have been made by the appellant and which were asked and answered without any proof (other than such purported admissions) that a crime had been committed either before or after such questions were asked and answered.

QUESTIONS PRESENTED IN THIS CASE.

1. Was the appellee, on the facts of this case, entitled to rely upon proof of income by the net-worth increase-expenditure method?

2. Assuming that appellee had a right to rely on this method of proving income tax evasion, did the appellee prove with reasonable certainty the appellant's net worth on December 31, 1945?

3. Can a conviction be sustained on the net-worth expenditure method where there is *absolutely no* evidence as to source of income and where there is a total lack of evidence of a lucrative business or calling?

4. Can a conviction of income tax evasion be sustained in a case where the prosecution proves only expenditures by a taxpayer in the light of testimony which conclusively proves the prior affluence of the appellant?

5. Are the extrajudicial statements of a defendant subject to a motion to strike if the prosecution fails to corroborate the parts relied upon therein for a conviction?

6. In a case which involves only two and one-half days of testimony, is not fourteen months between the start of the trial and the pronouncement of judgment a denial of a defendant's right to a speedy trial in violation of the Sixth Amendment to the United States Constitution, and should not the defendant's motion in arrest of judgment be granted in a situation surrounding these facts?

STATEMENT OF FACTS.

At the outset of the trial of this case, the prosecution announced that it intended to "proceed on the basis of the net worth in so far as income is concerned." (R. Tr. p. 31, lines 20-24.)

> "Mr. Maxwell. Then the Government will show a large increase in net worth amounting to some $80,000 over the four-year period.
>
> The Court. Four years?
>
> Mr. Maxwell. Yes. I think it was $84,000. And also the income was not reported on the income tax returns, and that it was not reported, with wilful intent to evade taxes, and that the principal source of this income was gambling winnings.
>
> The Court. Gambling winnings?
>
> Mr. Maxwell. Gambling winnings, yes, sir.
>
> The Court. Is there going to be any contention there was an attempt to cover up because of an illegal operation of some kind?
>
> Mr. Maxwell. Yes, your Honor, there will be that contention, particularly that the defendant dealt in cash throughout, did not maintain any

bank account except one account (5) which was concerned with the collection of monies on a deed of trust which he owned."

(R. Tr. p. 33, lines 1-20.)

In order to substantiate this contention, the prosecution first offered into evidence, without objection, the income tax returns for the years 1946 to 1949 to show what taxes had been paid by the appellant.

The appellant and appellee then stipulated that if certain witnesses were called they would testify as to expenditures made by the appellant during the years in question, subject to a motion to strike upon all the legal grounds, including the failure of the prosecution to prove a net worth case in accordance with the principles of law. This evidence was introduced immediately after the income tax returns had been received in evidence over the objection of the appellant upon the grounds that the expenditures are not admissible until a beginning net worth and source of income has been established. The Court permitted this evidence subject to a motion to strike. (R. Tr. p. 43, lines 4-32.) Testimony was admitted showing large expenditures by the appellant. At the conclusion of the prosecution's case, the motion to strike was renewed and denied by the Court.

In order to prove its case on this theory, the prosecution called six witnesses, by whose testimony the essential elements of the offenses set out in the indictment were sought to be established. Their testimony, although in parts touching upon matters not material

to the issues, falls utterly short of proving the offenses with which appellant is charged. As a matter of fact, the material part of their testimony proves the innocence of the appellant.

First witness: Rosario Mandalari.

Q. Mr. Mandalari, do you know the defendant in this case?

A. I do.

Q. How long have you known him?

A. Well, since 1938.

Q. Since 1938. And during that time he has lived in Stockton, (40) California?

(R. Tr. p. 65, lines 5-10.)

Q. (By Mr. Boscoe.) Let me ask you this: How did it happen that you went to him for this $20,000, Mr. Mandalari?

A. Well, we went hunting and fishing all the time together, and I know he has got money; he told me he had money.

Q. You knew he always had money, is that correct?

A. *Since I know him, yes.*

Q. And when you say you were socially acquainted with him, you gambled with him, did you mean to convey to the Court that he gambled for any stakes approximating any of the figures that the Government has given here?

A. That is right, I played pan and pinochle, that is all.

Q. Can you remember one game in 1946, '47, '48 or '49 in which Mr. Campodonico won any money from you? One game; just one game?

A. No.

Q. You cannot?

A. No.

Q. You have been playing with him since 1938, is that correct? (47). Did you ever see him win any money in 1946, '47, '48 or '49?

A. I saw him probably win $2 in a pan game, or $5 pan game.

Q. When? What year?

A. I don't know what year.

Q. You don't even know if it was '46, '47, '48 or '49?

A. That's right, I couldn't.

Q. Could it have been in prior years?

A. I couldn't say, that is right, I couldn't say.

(R. Tr. p. 70, lines 23-32; p. 71, lines 1-22.)

Second witness: Eva M. McNabb.

Q. Mrs. McNabb, you made out Mr. Campodonico's income tax for the years that you have testified to. You did it from a W-2, is that correct?

A. Yes, this thing here (exhibiting).

Q. And you also kept the records and the books of the establishment where you worked, is that correct?

A. Well, yes, records were brought to me, Mr.——

Q. You knew that he was carried in that establishment as an employee, is that correct?

A. Yes, sir.

Q. And you knew he had a social security number; right?

A. Yes.

Q. You didn't mean to testify here that Mr. Campodonico was engaged in gambling in this establishment, did you?

A. I didn't say that.

Q. I mean, it is your testimony that you don't know whether Mr. Campodonico engaged in any gambling whatsoever, at this establishment?

A. I said he was employed there.

Q. He was employed?

A. Yes.

(R. Tr. p. 86, lines 21-31; p. 87, lines 1-13.)

Third witness: Joe Gianelli, testified that he was the manager of the Union Club, a gambling establishment where appellant was employed as a floor man and bouncer:

A. What was your employment? What was your occupation in the year 1946 and the first part of 1947, Mr. Gianelli?

A. I was working for Mr. Hill.

Q. And in what capacity, sir?

A. I was the manager there.

Q. You were the manager?

A. Of the club.

Q. Of the club?

A. The clubroom, the 33 Club, the Union Club.

(R. Tr. p. 90, lines 16-25.)

Q. Was Mr. Campodonico an employee of the club at that time?

A. Yes, he was, sir.

Q. When was he employed, sir?

A. I don't remember just which year he went to work there. It was the latter part of the years of the forties, but before 1946. It would have been 1943 or 1944.

Q. When did his occupation or employment terminate?

A. The first part of 1947.

Q. Do you remember what month?

A. I think it was May.

Q. What was the occasion for that?

A. Well, the thing got closed, the town was closed.

Q. Now, what activities went on—strike that. What was Mr. Campodonico's job at the club, sir?

A. Well, he was sort of a floor man, bouncer and took care of the games when I wasn't there.

(R. Tr. p. 91, lines 8-25.)

This witness also gave the following testimony:

Q. During this period that you have known him, Mr. Gianelli, Mr. Campodonico—thirty years, is that your testimony? You have been close with him for that period of time?

A. Fairly close, yes.

Q. Pardon me?

A. Yes.

Q. And during that period of thirty years have you ever known Mike Campodonico to do any gambling?

A. No, I never knew him as a gambler. I knew him to play games, but not as a gambler in the gambling sense.

(R. Tr. p. 96, lines 21-32.)

Q. And you were working for Mr. Hill as his employee, is that correct?

A. Correct.

Q. Mr. Campodonico was working under your supervision?

A. Yes.

Q. And you were kept constantly informed as to the business of the establishment, is that correct?

A. Yes, I would say so.

Q. And did you have any rule or policy in this establishment as to whether or not an employee could engage in gambling?

A. They could not gamble in there, no.

Q. That was one of the rules of that establishment?

The Court. Just a moment, I want to see if I understand you clearly. Doesn't the house have dealers in the game?

The Witness. The house had dealers, but none of the dealers could gamble in their place.

The Court. Strictly banking games.

The Witness. Not allowed in their off hours, they were not allowed to gamble in our place.

The Court. I see. All right. Proceed.

Q. (By Mr. Boscoe.) Mr. Campodonico wasn't even a dealer, was he?

A. No.

Q. All he did was handle the money from the safe to the games, is that correct?

A. That is correct.

(R. Tr. p. 97, lines 2-28.)

Fourth witness: Chester R. Taynton, an agent of the Bureau of Internal Revenue.

Q. In your investigation, you testified that you ascertained what Mr. Campodonico's occupation was?

A. Yes.

Q. You did that by consulting the police officers, correct?

A. Yes.

The Court. Is that all you consulted?

The Witness. Oh, no. I consulted other people.

Q. (By Mr. Boscoe.) And did you ascertain that at any time in his occupation as a gambler, he won any substantial sum of money?

A. No.

(R. Tr. p. 187, lines 29-31; p. 188, lines 2-9.)

The Court. I wanted to ask one question, about this question concerning gambling. What period of time did you conduct the investigation to determine whether or not any money was won in gambling?

The Witness. I just checked as far as the man's reputation as a gambler was concerned. I called at the police department and I asked the then chief——

The Court. This was when?

The Witness. This was in 1950.

The Court. Yes.

The Witness. Pardon me. In 1949.

The Court. Yes.

The Witness. And I asked him if he could give me any information on Mike Campodonico, and he said, "Mike Campodonico, oh, yes—a pimp and a gambler."

The Court. Well, you answered the question that you did not ascertain Mr. Campodonico won any substantial sums of money gambling?

The Witness. That is right.

The Court. The question I am asking you is, what period of time did that investigation cover?

The Witness. My investigation?

The Court. Yes. Over what period of time did you ascertain that he didn't win any substantial sum of money gambling?

The Witness. I answered that incorrectly. I didn't ascertain that he didn't win any. I didn't ascertain that he did.

The Court. You didn't ascertain that he did win any?

The Witness. No.

The Court. But that was over the whole period involved, 1943——

The Witness. I know of no one who can tell us he lost money.

The Court. That he won any substantial sum of money gambling?

The Witness. No.

The Court. From the period since '43, or prior to '43?

The Witness. For any period.

The Court. Any period. All right. All right, Mr. Maxwell.

Redirect Examination.

By Mr. Maxwell:

Q. Now, Mr. Taynton, in connection with the last question, did you make an investigation to attempt to determine these items, in other words, to attempt to determine any specific substantial money that the defendant got from gambling?

A. No.

Q. Did you attempt—did you contact various individuals in order to determine whether Mr. Campodonico won on any specific occasions substantial sums from gambling?

A. No.

Q. You did not?
A. No.
(R. Tr. p. 188, lines 16-32; p. 189, lines 2-32; p. 190, lines 2-10.)

Fifth witness: Wareham Seaman, a tax attorney, who represented the appellant and advised him to make a statement to the revenue agents (Exhibit No. 7). Incidentally, Exhibit No. 7, an extrajudicial statement of appellant entirely lacking in corroboration, is the only evidence in this record that appellant won any substantial sum in gambling, which statement the appellant refused to sign because it was not the truth.

The testimony of all the foregoing witnesses and of Wareham Seaman is directly contrary to the announced offer of proof of the prosecution:

Q. When did you first hear about embezzlement, the possibility that the defendant might—alleged that he embezzled money?
A. Oh, I presume a week or ten days after May 4.
Q. I see. And who brought the subject up?
A. Well, it wasn't anyone that brought the subject up. It was a rationalizing on my own that——
Q. In other words, you originated the idea?
A. That is right, and I made inquiry from that; it harked back to a previous conversation that I had had with him and with Mrs. McNabb.
Q. With Mrs. McNabb?
A. Right.
(R. Tr. p. 159, lines 7-19.)

A. The time and place would be, I believe, about the latter part of March in 1950 in my office, and we were discussing the fact that I wanted all the information that was available, I wanted him to tell me everything so that I could help him the greatest. And——

Q. I see.

A. ——Mrs. McNabb concurred in that thought and said that "Never lie to your doctor or your attorney," and she said it makes no difference where you get the money—she named several sources, and mentioned "even if you had stolen it." And, of course, I was keeping my eye on Mr. Campodonico, and that seemed to hit a tender spot, and I had made some inquiries that led me to believe that he might have embezzled that money. I wasn't certain of it and I questioned him on it, and finally he admitted that he had embezzled it.

Q. In your questioning of him did you suggest that if he had embezzled the money, that it might be a defense to a criminal tax prosecution?

A. No. I was more particularly interested in getting from him an admission that he had embezzled it.

(R. Tr. p. 159, lines 31-32; p. 160, lines 2-23.)

Q. And was there any reference in the conversations that he had with you in reference to having made this money gambling at any time?

A. Well, he admitted that he gambled in the past.

Q. In the past?

A. Yes.

Q. Prior to '43?

A. Right, uh-huh.

Q. You say you made inquiries to determine if he had embezzled some money. You weren't satisfied in your mind that Mr. Campodonico had made this money gambling, isn't that correct?

A. That's right.

Q. That is right. And these inquiries that you made were independent of any conversation that you had with Mr. Campodonico?

A. Yes.

Q. He led you to believe that the funds had been embezzled, is that correct?

A. That is right.

Q. It was your belief in urging that upon the Government that in fact the funds had been embezzled?

(R. Tr. p. 161, lines 30-32; p. 162, lines 2-19.)

A. That's right.

(R. Tr. p. 162, line 31.)

The sixth witness, called by the prosecution, was Shirley S. Atkin, the investigating agent for the Fraud Section of the Bureau of Internal Revenue:

A. I doubt if I asked Mr. Candelario about Mike's gambling activities. It was on another matter that I questioned Mr. Candelario on.

Q. Well, the Government in this case is basing its case on the fact that the increase in net worth was due to large gambling winnings or in gambling winnings. I will ask you, as a result of your investigation did you find any gambling winnings that this man made?

A. No.

Q. As a matter of fact, you found out that he did not gamble at all, is that correct, except, for

instance, friendly games that you are calling pinochle?

A. That is the result of my investigation, yes.

(R. Tr. p. 258, lines 12-25.)

Q. (By Mr. Boscoe.) Let me ask you: You went to the police department and inquired of various persons there as to how Mr. Campodonico made his money, didn't you?

A. Yes.

Q. They didn't tell you he made any gambling, did they?

A. No.

Q. No one in the police department told you that Mr. Campodonico was a gambler, is that correct? That is, that he made any money gambling?

A. They did use that term in describing Mr. Campodonico, together with other terms.

Q. They told you that—all persons you interviewed regarding Mr. Campodonico's occupation told you merely that he was working in a gambling house and that Mike wasn't a gambler, isn't that correct?

A. Well, they didn't specifically state that he wasn't a gambler, no. No, they said that he had the reputation of being a gambler; that is, in prior years.

(R. Tr. p. 259, lines 24-32; p. 260, lines 2-11.)

The extrajudicial statement (Exhibit No. 7) was offered and received in evidence over the objection of appellant. (R. Tr. p. 165, lines 30-32.)

This statement is the only evidence in the record that appellant made any substantial money in gam-

bling. It is pointed out that appellant would not sign this statement because it was not the truth. The only portion of the statement which the government relied on for conviction is that part where appellant said he won money gambling.

The testimony of every government witness not only fails to corroborate the statement, but is directly contrary to the contents therein insofar as gambling winnings are concerned.

It is submitted that the statement contained evidence showing that appellant since 1925 to 1943 had been engaged in lucrative callings, yet the appellant was not given the credit for affluence in the years before 1943.

The appellant, in the face of the total lack of evidence showing unreported income during the years in question, did not testify in his behalf on the advice of his counsel.

The prosecution and appellant stipulated, however, that appellant and/or his wife had, in their proper names, safe deposit boxes in the Bank of America (Main Branch) at Stockton, California, four safety deposit boxes dating back to 1936, and that in the year 1943, appellant and his wife had not one, but two of said boxes. (R. Tr. p. 299, lines 20-31 and p. 300, lines 1-13.)

A further stipulation was also entered into which reveals that on September 3, 1942, appellant owned a Hunter Cruiser, which appellant sold for $2,000.

In view of the fact that appellant could show these facts, together with the following:

1. Rosario Mandalari purchased a rooming house owned by appellant for $1700 in 1938. (R. Tr. p. 70, lines 5-17.)

2. That prior to January 1, 1946, appellant owned rooming houses, which were lucrative enterprises. (R. Tr. p. 289, lines 29-31 and p. 290, lines 1-9.)

3. That appellant paid $3,524.60 to the American Trust Company in Stockton, California, to pay off a loan on a house, which fact was unknown to the investigating agents who calculated appellant's net worth on December 31, 1945. (See Defendant's Exhibit A.) (R. Tr. p. 193, line 31; p. 194, lines 1-7.)

4. That in the 5th month of the year 1946, appellant paid in cash the sum of $22,500 for the purchase of a house, certainly raises an inference that appellant had cash on hand, which was not taken into account, on January 1, 1946. (R. Tr. p. 270, lines 6-18.)

It is submitted that the beginning net worth adopted by the prosecution is not only lacking in reasonableness, but a mere guess and utterly unfair and unjust.

THE MOTION IN ARREST OF JUDGMENT SHOULD HAVE BEEN GRANTED.

This trial was commenced in the trial Court on May 13, 1952 at 10:30 A.M. The prosecution rested on May 14, 1952, and following motions to strike testimony and for a judgment of acquittal, the case was continued by the Court to allow briefing of the points of law, five days for appellant to open, five days for appellee to answer, and three days additional for appellant's reply. Briefs were submitted by each side on the motions referred to above and the case was continued on order of the Court, without the consent or approval of appellant, until August 8, 1952, on which date appellee reopened its case for one additional witness, after whose testimony the Court remarked: "I do realize there has been additional evidence by the government here which may *tend to detract and which may make the case weaker, than it was originally.*" (R. Tr. p. 295, lines 14-19), and at the end of the case, the Court again stated: "I understand your argument and I have analyzed these witnesses' testimony, (referring to the prosecution's witnesses on 'no gambling') and I can't say that it improves the Government's situation any, but nevertheless I must rule that the motion for judgment of acquittal must be denied at this time." (R. Tr. p. 298, lines 8-13.)

The attention of the Court of Appeal is particularly invited to this phase of the case in view of the fact that there could not have been more than twelve hours testimony in the entire case. Moreover, the points

involved had been thoroughly briefed by both sides when the Court made these statements.

The trial Court again, without consent or approval of the appellant, continued the case for final argument to September 5, 1952, at which time the case was fully argued by both sides.

Nothing further was heard or done in this case until June 13, 1953, when the Court filed a memorandum opinion adjudging the appellant guilty on each count. The continuance of the case to June 13, 1953 was certainly not with the approval or concurrence of appellant. Thereafter, a further continuance was taken by the Court until July 13, 1953, without the consent or approval of appellant.

It is submitted that this is in violation of the appellant's rights to a speedy trial insured to everyone charged with crime under the Sixth Amendment to the Constitution of the United States.

ARGUMENT.

At the beginning of the trial, counsel for the Government announced that this was a "NET WORTH" case, and that the source of income was from large "GAMBLING WINNINGS", and also that he would show an attempt on the part of the defendant to cover up "PROCEEDS FROM ILLEGAL OPERATIONS".

The issues presented are hereinabove set forth.

No evidence whatsoever was introduced by the Government, tending to show that the defendant failed to report the income he received from:

1. Gambling winnings (except the uncorroborated statement of the defendant which was conclusively established to be untrue insofar as profit from gambling is concerned.)

2. Wages.

3. His partnership interest in the Capitola Liquor Store.

The evidence shows that the property acquired by the appellant was purchased with cash. There is no direct evidence as to the SOURCE from which this cash was obtained, nor any evidence of the date or dates of the acquisition of such cash.

It is submitted that there is no competent evidence of circumstances from which even an inference might be drawn as to the source of the cash acquired by the appellant, which could be considered as taxable income.

As to the presence of any circumstantial evidence from which an inference might be drawn as to the source of this money, the prosecution utterly failed to produce even a scintilla of evidence. The evidence is, however, direct and clear from testimony of the Government's own witnesses, that the *appellant did not gamble* at the Union Club, nor at any other place, during the years involved, and that the wages he received while working at this club, were properly reported, and that the appellant "REPORTED THE

CORRECT PARTNERSHIP INCOME" from the Capitola Liquor Store. (R. Tr. p. 182, lines 9-23.)

So it is that in view of the positive evidence dispelling any inference of gambling winnings by the defendant, there is absolutely no testimony in this case from which this Honorable Court can infer or find that the appellant had one cent of taxable income in the years in question, to-wit: 1946, 1947, 1948 and 1949.

The internal revenue agent, Mr. Taynton, testified that he did not take into consideration the cash which he might have had on hand, and he must have known that the defendant had a large amount of cash on hand, because he had taken a statement from him in which the defendant stated that he had between $45,000.00 and $50,000.00 in cash, plus other assets, prior to 1946. This testimony, which the Government is bound by, is set forth in Government's Exhibit No. 7—The Purported Statement of Defendant, at pages 16, 17 and 18.

One of the main issues in this case on appeal is whether or not the prosecution has established a net worth case. The determination of this fact is all important in the denial of the motion for an acquittal. It is the contention of the appellant that a net worth case has not been established for two reasons, namely:

1. A beginning net worth has not been established; and
2. A lucrative source of income has not been established.

A net worth tax case is essentially founded upon circumstantial evidence, and a tax case is no different from any other case involving circumstantial evidence, so that the rule of elimination of all reasonable hypotheses, except that of guilt, is applicable. Similarly applicable are the rules of evidence with respect to confessions or admissions in the nature of confessions, requiring the establishment of the elements of the crime, or the corpus delicti, before such admissions may be accepted as competent evidence.

I. A beginning net worth has not been established.

A beginning net worth is an essential element of a net worth case. The rule is set forth in the leading case of *U. S. v. Chapman,* 168 Fed. 2d 997, as follows:

> "In a net worth case, the starting point must be based upon a solid foundation, and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict."

The case at bar is even stronger because appellant in his statement advised the agents he had a great deal of cash on the beginning year, which was totally ignored.

If the rule were otherwise one could be prosecuted for income tax evasion by the mere showing that one has a large amount of cash on hand. Can it be contended that such a person must under these circumstances ALONE be put on proof as to the source of this large amount of cash? Such is not the law.

"The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income."

United States v. Alphonse Capone, 56 F. 2d 927.

There has been a great deal of recent tax litigation involving the two principles above stated. Of necessity, the facts and circumstances have differed in each case, but a careful study of the reported cases reveals that in all cases where a superficial conflict in the decisions appears, it is the facts and circumstances of each case that are responsible for the apparent conflicts, rather than the underlying principles of law. In other words, the fundamental laws of evidence as stated above have never been held not to be applicable in tax cases.

As to the type and quantum of proof required to establish a beginning net worth, there are recent decisions which might be construed as establishing either a strict or a liberal view of this requirement. The two cases generally cited as advocating the strict view are the *Bryan* and *Fenwick* cases, and the cases cited as advocating the liberal view are the *Bell* and *Brodella* cases, as follows:

Bryan v. U. S. (C.C.A. 5, 1949), 175 F. 2d 223, 38 A.F.T.R. 56;

Fenwick v. U. S. (C.C.A. 7, 1949), 177 F. 2d 488, 38 A.F.T.R. 810;

Bell v. U. S. (C.C.A. 4, 1951), 185 F. 2d 302, 39 A.F.T.R. 1279;

Brodella v. U. S. (C.C.A. 6, 1950), 184 F. 2d 823, 39 A.F.T.R. 1096.

It is interesting to note, however, the language of the United States Tax Court, citing and approving the *Bryan* and *Fenwick* cases on October 7, 1953, decided after the decision in the case at bar.

King Tsak Kwong v. Commissioner, 12 T.C.M. Docket No. 27,019, C.C.H. Dec. 19, 924 (M).

"In a 'net worth case,' the starting point in the respondent's computation, i.e., his computation of assets, liabilities and net worth at the beginning of the period under question must be sound."

United States v. Chapman, 168 Fed. 2d 997, 1001;

Bryan v. United States, 175 Fed. 2d 223 (49-1 U.S.T.C. No. 9322), aff'd., 338 U.S. 552, 50-1 U.S.T.C. No. 9140;

United States v. Fenwick, 177 Fed. 2d 488, (49-2 U.S.T.C. No. 9448).

In the *Bryan* case the Government proved that the expenditures exceeded the reported gross income. The defendant's net worth as of January 1, 1941, was computed by the Government to be approximately $107,000.00 determined from all known and available sources of information, including the cost of real estate, furniture and fixtures in night clubs and gambling places, and cash in bank. The Government's witness admitted that he did not know whether this

computation contained all of the assets of the defendant or not. This was fatal because as the Court stated:

> "The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant * * * In view of the auditor's admissions that he was not able to say that his computation included all of the assets of the defendant at the beginning of the period, together with the absence of any admissions, records, financial statements, bookkeeping entries, or other findings, or evidence tending to bind the defendant as to the lack of additional assets at the beginning of the tax period, the evidence * * * was insufficient to make out a prima facie case against the defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income."

In the *Fenwick* case there was no direct proof of unreported income. The defendant was a druggist and his prosecution was based upon alleged increases in net worth in excess of that reported for income tax purposes. The beginning net worth for the year 1943 was the issue. On cross-examination, the revenue agent admitted: That he did not ask the defendant whether he had cash on hand accumulated from the earnings of his business; that there was no evidence as to the amount of bonds or stock owned by the defendant at the end of 1942, and no determination

whether any were cashed in 1943 and 1944; that there was no proof of the value of a life insurance policy at the end of 1942, or whether it was surrendered or cashed; that depreciation was not taken into account.

The conviction of the defendant was reversed by the Circuit Court for the reasons as stated:

> "Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and *where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations cannot be relied on.* Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt"

In the *Bell* case the evidence consisted "* * * in part of estimates of the net income of the defendant * * * based upon calculations of his net worth, * * * and also the statements of the defendant to the reve-

nue agents who investigated the case". Bell was an auctioneer and a dealer in art works and antique furniture, and also dealt in real estate and insurance. A net worth statement as of December 31, 1942, was prepared by the revenue agent, which was made available to Bell's accountant. Bell made no claim at the time that he possessed other assets than those shown on the statement, and he offered no evidence at the trial to contradict this beginning net worth statement. The statement prepared by the agent showed that the greatest increase in net worth was in real estate. "The testimony as to the *source of the funds* with which Bell increased real estate holdings has an important bearing upon the sufficiency of the proof to take the case to the jury." When questioned regarding the source of funds with which he purchased three pieces of real estate, Bell told of loans from his mother, and that one purchase was made by his wife, all of which the jury evidently disbelieved. In connection with the purchase of another piece of property, "The net worth statements show no reduction of the other assets or increases of liabilities sufficient to cover the increase in the taxpayer's real estate."

The defendant made the contention that the evidence of net worth was inaccurate and lacking in probative force, and specified certain details. The Court found that, "An examination of the record indicates that the probative force of the evidence * * * is not undermined by these criticisms," and then proceeded to discuss the probative force of the evidence

in the record, and determined, "In short, these criticisms of the basic opening statement, considered separately or together, furnish no ground for its exclusion from the jury. The agent testified that he had found no evidence of intimation of other assets which he failed to include, and his statement was furnished to the defendant's accountant, and was not challenged."

The rulings in the *Bryan* and *Fenwick* cases, supra, were brought to the attention of the Court, to which it replied: "* * * *But we cannot follow these decisions since it is obvious that they are based upon their particular facts and they do not relieve us from the duty of appraising the sufficiency of the evidence in the case before us.*"

The second alleged liberal policy case is that of *Brodella v. U. S.* This case involved an application for bail pending appeal, so that the issue was solely that of the sufficiency of the evidence to take the case to the jury. The Court discussed at length the *Fenwick* and *Bryan* cases, supra, pointing out the difference in the evidence upon which the decisions were based, stating: "* * * *We agree with the general principle of law as stated by those cases. However, it is an entirely different question whether the facts of any particular case bring the rule into play.*" (Emphasis supplied.)

The Court then proceeded to enumerate the evidence in the record to support the finding that it was sufficient to take the case to the jury. This evidence consisted in part, as follows: Defendant told the

agent he had accumulated $140,000.00 in cash, which he later said was in error and should be deleted from the statement. Subsequently, he changed the amount to between $50,000.00 and $60,000.00. This claim was investigated by the agent, but disallowed in his computation, which action the Court approved. There was also evidence that the profits reported from business were not in line with the profits from other businesses of the same type, and that purchases of liquor were omitted from the books.

The Court pointed to specific facts upon which to justify its decision that a satisfactory beginning net worth had been established to distinguish this case from the *Bryan* and *Fenwick* cases.

From the above analyses of the four foregoing cases, of which the *Bryan* and *Fenwick* cases are referred to as strict, and of which the *Bell* and *Brodella* cases are referred to as liberal, it appears that the real distinguishing features consist of facts rather than principles of law. The fundamental principles of law are present in each case. These fundamental principles are aptly set forth in the case of *U. S. v. Chapman* (C.C.A. 7, 1948), 168 F. 2d 997, 36 A.F.T.R. 1176, p. 1180, as follows:

The starting point in a net worth case must be based *upon a solid foundation and a revenue agent's statement of the defendant's oral admission or confession, when uncorroborated, is not sufficient to convict.*

It is apparent that under doctrine of the *Bell* and *Brodella* cases, relied upon by the Government, the

appellant Michael Campodonico's motion for acquittal should have been granted for the following reasons:

1. In the *Bell* case, it was affirmatively proved that Bell was engaged in a lucrative business, to-wit: Dealer in real estate, an auctioneer, and a dealer in furniture, and carried on a business under the fictitious name of Mount Vernon Galleries, and the agent for the Government, who investigated his increase in net worth, testified the defendant had a *Source of Income from which the increase in net worth was derived.*

In the case at bar the revenue agent testified that although he was advised that the appellant was a gambler, he positively stated that his investigation failed to disclose any gambling winnings whatsoever. Moreover, all the witnesses, testifying in behalf of the Government, established the fact, beyond any doubt, that the appellant's increase in net worth was not derived from gambling. Moreover, in the *Bell* case, the agent testified that part of his calculations were based on the defendant's statement, whereas, in the case at bar, the agent ignored entirely the statement of the appellant, which was that he had amounts amounting to $80,000.00 prior to 1946. (Exhibit No. 7, pp. 16, 17 and 18.) Thusly, it is obvious that insofar as beginning net worth and source of income, the *Bell* case, on its facts, does not support the Government's contention in the case at bar.

Similarly, the *Brodella* case is distinguishable from the case at bar on its facts, and the law applicable thereto. In the *Brodella* case, the Government estab-

lished that the defendant was engaged in two businesses, and that the defendant's books failed to disclose purchases of liquor, and the resulting profit from the sale thereof. Moreover, in the *Brodella* case, the revenue agent investigated the taxpayer's statements regarding his cash on hand at the beginning of his net worth period, whereas, in the case at bar, the agent positively testified that he made no investigation of the cash on hand, although he had direct evidence that the appellant had $45,000.00 or $50,000.00 in cash on hand, plus considerable other assets, and arbitrarily assumed that appellant had no cash at all on hand.

It is submitted that it must be obvious to this Court that the appellant had large sums of cash on hand at the end of 1945, in view of the fact established by the Government's witnesses that the defendant's whole record is one of large cash transactions, before and subsequent to December 31, 1945, especially in view of the fact that in the fifth month of 1946, he paid $22,500.00 in cash for a home.

On this point, when the trial Court was wrestling with the problem as to whether the motion for judgment of acquittal should have been granted at the conclusion of the Government's testimony, it made this remark:

> "The Court. But it seems to me that this is a considerable question of law, because, as I see it now, there is a considerable question in my mind as to whether or not—in view of the failure to show where the income came from, other than

that which was reported, and in view of the failure to show that he didn't have another source, didn't have it when he started; the starting point is completely blank of any cash, and this man's whole record is a record of cash transactions——

Mr. Seawell. That is correct.

The Court. ——both before and subsequently. That is a fact to be argued.

Mr. Maxwell. May it please the Court, may I ask one or two questions of the Court?

The Court. Yes.

Mr. Maxwell. In the first instance, as to the matters of net worth that were stipulated, you may recall these transactions were stipulated along with the other media there—in other words, that the purchases and sales were by cash.

The Court. That is right.

Mr. Seawell. But you say there wasn't any cash. The agent, he knew there was a lot of cash.

The Court. In other words, I am raising a query: During this four-year period of cash transactions, or practically all transactions,——

Mr. Seawell. One check, I think.

The Court. He had a couple of short-period encumbrances which he paid off very quickly, so they were practically cash transactions. Isn't it strange he had no cash when he started?

Mr. Seawell. That is our position.

The Court. And I want you to go into that. That goes to the starting point."

(R. Tr. p. 229, lines 10-33 to p. 230, lines 1-11.)

II. A lucrative source of income has not been established.

The revenue agent, testifying for the prosecution, stated that he made no adjustments in the amounts

reported by the defendant from the known sources of income, such as wages, partnership profits of the Capitola Liquor Store, sales of property, and possibly other transactions, for the years involved in this case. In effect, he reluctantly admitted that the defendant correctly reported all of his income from known sources. The agent stated that he did not know of any other sources of income, and, specifically, that he did not know about any gambling winnings of the defendant. No other witness has testified that the appellant had other sources of income, nor that the appellant received any substantial amount from gambling.

In view of the opening statement of counsel for the Government, and the attempted proof produced at the trial, the issue as to a lucrative source of income appears to be narrowed down to the single question as to whether or not the appellant was in receipt of gambling winnings during the years covered in the indictment.

Of course, the appellant did state in his purported statement, Trial Exhibit 7, that he did make money gambling, but he refused to sign this statement, for the reason that such statements were not the truth. He refuted these statements and declined to sign the document, both of his own accord, and upon advice of his counsel.

It is most sincerely urged by the appellant, and it is believed that an impartial appraisement of all of the evidence will reveal, that the appellant was not in receipt of gambling winnings during any of the years involved in this case.

The authorities are generally in accord with the proposition that in a net worth case, a lucrative source of income *must* be established, in addition to a satisfactory beginning net worth. The statement, commonly quoted as authority for this proposition, appears in *Gleckman v. U. S.* (C.C.A. 8, 1935), 80 F. 2d 394, p. 399, 16 A.F.T.R. 1425, p. 1430, as follows:

> "On the other hand, if it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, * * * We think there was in this case substantial circumstantial evidence that Mr. Gleckman did have a business outside of that described in his return and at least some of his deposits were derived from it."

The *Gleckman* case has been cited and approved by the Ninth Circuit Court of Appeals in the case of *Himmelfarb v. U. S.* (C.C.A. 9, 1949), 175 F. 2d 924, p. 949, 38 A.F.T.R. 145, p. 170, wherein the statement first above mentioned was quoted verbatim.

The *Gleckman* case has also been cited and approved in many other circuits, as follows:

Rosenblum; U. S. v. (C.C.A. 7), 176 F. 2d 329, 38 A.F.T.R. 327;

Fenwick; U. S. v. (C.C.A. 7), 177 F. 2d 490, 38 A.F.T.R. 1006;

Kirsch v. U. S. (C.C.A. 8), 174 F. 2d 595, 37 A.F.T.R. 1498.

At page 601 of this decision, the Court said: "It may be conceded here as it was in the Gleckman case, 80 F. 2d loc. cit. 399, 'that the bare fact, standing alone, that a man has deposited a sum of money in a bank would not prove that he owed income tax on the amount.'" The foregoing question need not now be determined, because there was other substantial evidence, heretofore noted, of income in excess of that reported.

Venuta; U. S. v. (C.C.A. 3), 182 F. 2d 521, 39 A.F.T.R. 540, p. 542.

While the decision in this case was reversed upon another ground, the Court noted: "Suffice it to say that this record contains evidence from which a jury could conclude beyond a reasonable doubt that during the prosecution years defendant had businesses of a lucrative nature, * * *"

Carmack v. Comm. (C.C.A. 5), 183 F. 2d 2, 39 A.F.T.R. 621;

Graves v. U. S. (C.C.A. 10), 191 F. 2d 582.

Throughout the numerous decisions involving the validity of convictions based upon net worth calculations, the question of a lucrative business or calling has always been relied upon. Every case called to our attention, in which the decision is affirmed, points to the fact of the existence of such a lucrative business or calling as at least one of the grounds upon which the affirmance is based.

U. S. v. Johnson, 319 U.S. 503, 63 S. Ct. 1233, 30 A.F.T.R. 1295, p. 1301.

In the instant case, if the premises heretofore stated are logically correct, the question to be "focused" upon is: Did the appellant receive gambling winnings during any of the years 1946, 1947, 1948 or 1949? There is no direct evidence in the record that he did. On the contrary, the revenue agent testified that he did not discover any evidence of gambling winnings. Mr. Gianelli, an intimate acquaintance and associate of the defendant, also testified that the defendant did not gamble. In view of this positive and direct testimony, it is respectfully submitted that there is no evidence to show that the defendant did receive gambling winnings.

Notwithstanding the trial Court's remarks above noted on the question of cash which appellant must have had on hand on January 1, 1946, in its memorandum opinion filed June 13, 1953 (R. Tr. p. 9, lines 24-27; R. Tr. p. 10, lines 1-32; R. Tr. p. 11, lines 1-32; R. Tr. p. 12, lines 1-20), the trial Court relied chiefly on *Remmer v. United States,* 205 Fed. 2d 277, stating:

> "* * * The defendant challenges the beginning net worth in that it makes no allowance for cash on hand by the defendant * * *"

The trial Court then went on to announce, in the usual terms that have been applied in these cases, namely, that there may be some question concerning the "mathematical exactness of the beginning net worth", and further that "this question has recently

been disposed of in the case of *Remmer v. United States".*

Attention of this Court is invited to the fact that certiorari has been granted in the *Remmer* case on one of the same issues presented before us in the case at bar. *Remmer v. United States,* ..... U.S. ....., 98 L. Ed. (Advance p. 81), November 16, 1953.

More recently, however, the case of *Calderon v. United States of America,* 207 Fed. 2d 377, was decided by this Court, which alone is sufficient authority to reverse the case at bar. In that case, this Court stated:

> "The burden of proof is on the prosecution as to each pertinent starting item of the net worth statements to a reasonable certainty. Absent, such a starting item as, say, cash on hand the remainder of the statement proves nothing. Here, there is no question as to the items 'cash in bank' as to each of the four years. * * * As to 'cash on hand,' that at the start of the accounting period, must be low enough to combine with the other factors to show a greater income than reported."

The Court went on to say:

> "The only other evidence showing the charged misstatements consists of Calderon's verbal statements to the tax officials and to his bookkeeper.
>
> A fortiori, since such written statements are extrajudicial, these verbal statements are. They cannot be the basis of a conviction absent, as here some independent proof of the corpus delicti"

and cited with approval:

Bryan v. United States, 175 Fed. 2d 223, 226 (Cir. 5);

United States v. Fenwick, 177 Fed. 2d 488 (Cir. 7);

Guriepy v. United States, 189 Fed. 2d 459, 463 (Cir. 6);

Brodella v. United States, 184 Fed. 2d 823, 825 (Cir. 6);

United States v. Chapman, 168 Fed. 2d 997, 1001 (Cir. 7);

Pong Wing Quong v. United States, 111 Fed. 2d 751 (Cir. 9).

It is submitted that the trial Court erred in relying on *U. S. v. Remmer,* not only for the reasons stated above, but also because in the *Remmer* case the Court set out the probable lucrative sources of income, which were as follows:

1. The B-R Smoke Shoppe.
2. The Day & Nite Cigar Store.
3. 110 Eddy Street.
4. The Menlo Club.
5. The 21 Club.
6. The San Diego Social Club.

THE MOTION IN ARREST OF JUDGMENT.

It certainly cannot be said in this case that the appellant enjoyed a "speedy" trial as the term is

contemplated in the Sixth Amendment to the United States Constitution, and it cannot be said in this case that appellant in any way contributed to this delay. All the continuances and delays were not in any way occasioned by the appellant. Certainly, a year and two months from the beginning of a criminal trial lasting only twelve to fourteen hours, to the pronouncement of judgment, is utterly unfair and a denial of one's rights under our law from which all persons accused of crime should be spared.

Ex parte Singer, 284 Fed. 60 (1922);

Ex parte Dellan (C.C.A. 9), 1928, Calif., 26 Fed. 2d 243;

Pratt v. U. S. (1939), 102 Fed. 2d 275.

In *Pinkussohn v. U. S.* (7 C.C. 1937), 88 Fed. 2d 70, the Court stated as follows:

> "While we have no hesitancy in sustaining the sentence, we are somewhat at a loss to know why the case which was tried in November should not have been disposed of until May 4 of next year. The entry of a motion by accused for a finding of not guilty on the ground that the evidence was insufficient to support a conviction caused some postponement of action by the court, but it is hardly an excuse for the long delay that elapsed before the simple case with few or no legal questions involved, was disposed of * * *"

CONCLUSION.

It is submitted that there was no substantial evidence in the record in this case from which the Court

could infer that the appellant had received substantial income in the years 1946 and 1947 which he did not report in his income tax returns.

We are at a loss to determine why the Court granted appellant's motion for acquittal of counts four and five and not one, two or three. Is there any evidence in support of the first three counts which is not present in the latter two? As large expenditures were made insofar as counts four and five as there were insofar as counts one, two and three are concerned.

It is definitely established by the Government's own witnesses that appellant made no money at gambling. He had no source of income from which the alleged unreported income was derived. The beginning net worth was only guesswork, in view of the revenue agents' testimony that they had heard of appellant's affluence in prior years.

We further urge the Court that the motion in arrest of judgment should have been granted, and a reversal of the judgment should be based on this ground and all the others urged in this brief.

Dated, Stockton, California,
December 18, 1953.

Respectfully submitted,
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By DONALD D. BOSCOE,
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No. 14,089

IN THE

United States Court of Appeals

For the Ninth Circuit

MICHAEL CAMPODONICO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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No. 14,089

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BRIEF FOR THE UNITED STATES.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The appellant, Michael Campodonico, was indicted on November 26, 1951, in the District Court for the Northern District of California, Northern Division, as follows:

Count One—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1946, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $11,730.98.

Count Two—for willful and knowing attempt to evade and defeat income tax due and owing by him for the year 1947, by means of the filing of a fraudulent income tax return which understated his income tax in the amount of $2,237.47.

Count Three—for willful and knowing attempt to evade and defeat income tax due and owing by his wife, Esther Campodonico, for the year 1947, by means of the filing of a fraudulent income tax return which understated her income tax in the amount of $2,317.97.

Count Four—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1948, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $488.52.

Count Five—for willful and knowing attempt to evade and defeat income tax due and owning by him and his wife for the year 1949, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $4,775.94.

The appellant was arraigned on November 30, 1951, before United States District Judge Dal M. Lemmon, at which time appellant entered a plea of not guilty to each count of the indictment. The case came on for trial on May 13, 1952, before the Honorable Oliver J. Carter, judge. Jury trial was waived by the appellant. (R. 30.) At the close of the Government's case, on May 14, 1952, the appellant moved for judgment of

acquittal (R. 228), and the trial was continued until further order of the Court in order that briefs might be submitted and appellant's motion be given full consideration by the Court. On August 8, 1952, appellant's motion for acquittal was denied (R. 233), and the United States reopened its case in chief for further testimony. (R. 234.) On August 8, 1952, appellant's motion for judgment of acquittal was renewed and denied, the appellant rested, and the case was continued to September 5, 1952, for final argument, on which date the case was submitted.

On June 13, 1953, Judge Oliver J. Carter adjudged the appellant guilty as charged in each count of the indictment. On July 17, 1953, appellant moved for arrest of judgment, which was denied, and a motion for judgment of acquittal was granted as to Counts 4 and 5. Motion for a new trial was also denied on that date. On July 17, 1953, Judge Carter sentenced the appellant to imprisonment for a period of 18 months and a fine of $5,000 on Count 1; to imprisonment for a period of 18 months on Count 2, said terms of imprisonment to run concurrently; and to no imprisonment or fine as to Count 3. Notice of appeal was filed on July 27, 1953, and bail on appeal was set at $6,000.

STATUTE INVOLVED.

Title 26, Int. Rev. Code; Sec. 145(b).

PENALTIES.

* * * * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

During the year 1946 and until May of 1947, the appellant, Michael Campodonico, was employed by the Union Club, an illegal gambling house at Stockton, California, as floor man, bouncer, and substitute manager. (R. 91.) He had been so employed since 1943 or 1944. (R. 91.) Prior to 1946, the appellant, by his own admission, had engaged in illegal occupations since the 1920's: In the early 1920's he was a bootlegger (Ex. 7, p. 3); from 1927 to 1937 he was a bootlegger and a gambler (Ex. 7, p. 6); for the years 1937 to 1942 he gambled and played the horses (Ex. 7,

Computation of Unreported Income on Net Worth Basis.
Computation of Net Worth as of December 31,

ASSETS	1945	1946	1947	1948	1949	Source	Reference Page
Cash on hand from Baker St. property	$	$23,247.25	$	$	$	Sale of house	49, 115, 167
Herrera Deed of Trust		1,902.44					115, 184
1130 Victoria St.—Residence	6,000.00	6,000.00				Currency	51, 52, 109, 115
Fence on above property	100.00	100.00					109, 115
Swanson Deed of Trust			7,221.91	6,654.78	6,040.22	Sale of house	45, 115
B/A Hunter Sq. Savings a/c 8423			498.29	1,507.16	2,532.53	Collection	45, 46, 115, 117
Capitola Partnership 50% interest			17,830.59	18,788.91	17,968.88	Currency	57 to 63, 116
Mercury Station Wagon		3,076.00	3,076.00	3,076.00	3,076.00		59, 116
6009 Pacific—Residence			{12,551.67	{12,551.67	{12,551.67	Currency	52, 116
			{ 1,000.00	{ 1,000.00	{ 1,000.00	Currency	53
Improvements—Nomellini			15,288.00	15,288.00	15,288.00	Currency	54, 116
Small bldg. added					600.00		117, 122
Mandalari Deed of Trust					20,000.00	Currency	65 to 70, 117
Garwood speedboat		3,009.40	3,009.40	3,009.40	3,009.40	Currency	56, 115, 117
1946 Pontiac		1,800.00	1,800.00				115, 116
1948 Cadillac				3,924.02	3,924.02	Currency	56
1940 Hudson	750.00						57, 109
1946 Chevrolet Station Wagon		2,011.58	2,011.58	2,011.58	2,011.58	Currency	57, 115, 117
1948 Pontiac Coupe				2,608.80	2,608.80	Currency	57
War Bonds	3,675.00	3,675.00	3,675.00	3,675.00	3,675.00		109, 110, 111, 115, 117
Total assets	$10,525.00	$44,821.67	$67,962.44	$74,095.32	$94,286.10		
LIABILITIES							
None							115
Net Worth	$10,525.00	$44,821.67	$67,962.44	$74,095.32	$94,286.10		
Net Worth previous year		10,525.00	44,821.67	67,962.44	74,095.32		
Increase in Net Worth		$34,296.67	$23,140.77	†$ 6,132.88	$20,190.78		120, 213, 215
Non-taxable portion of capital gains			(2,200.00)				121, 213
Taxes paid		166.76	143.74	804.73	295.00		38, 117, 213
Living Expenses		720.00	720.00	720.00	720.00		117, 213, 215
Adjusted Gross Income		$35,183.43	$21,804.71	$ 7,657.61	$21,205.78		213, 214
Income per returns		3,814.81	6,080.89	‡ 3,395.43	4,617.05		18, 19, 20, 21
Unreported Income		$31,368.62	$15,723.82	$ 4,262.18	$16,588.73		
Total tax liability as corrected		$14,030.77	*$ 2,314.96	$ 904.00	$ 4,129.40		213, 214, 215
Tax disclosed on returns		369.00	* 327.00	205.00	392.00		18, 20, 21
Deficiency (tax evaded)		$13,661.77	*$ 1,987.96	$ 699.00	$ 3,737.40		
Total tax liability—Esther Campodonico—wife			*$ 2,476.46				19
Tax disclosed on return			* 427.00				
Deficiency (tax evaded)			*$ 2,049.46				
Total tax evaded for 1947			$ 4,037.42				

*For the year 1947—Separate returns were filed by husband and wife.

†Increase net forth for 1948 per R. 120 $6,297.08, also R. 214.

‡Amount shown in R. 20 $3,396.43.

Expenditures for Assets.

INCREASE IN ASSETS	1946	1947	1948	1949	Source	Reference Page
Cash on hand	$23,247.25	$	$	$	Currency	49
Herrera Deed of Trust	1,902.44					50*
Mercury Station Wagon	3,076.00				Currency	58, 59
Garwood Speedboat	3,009.40				Currency	56
1946 Pontiac	1,800.00					
1946 Chevrolet Station Wagon	2,011.58					
Swanson Deed of Trust		7,221.91				45
B/A Hunter Sq. Savings a/c		498.29	1,008.87	1,025.37		45
Capitola Liquor Store—Part interest		17,830.59	958.32		Currency	57,58, 63
6009 Pacific Ave. (residence)		13,551.67			Currency	52, 53
6009 Pacific Ave. (improvements)		15,288.00			Currency	54
1948 Cadillac			3,924.02		Currency	56
1948 Pontiac Coupe			2,608.80		Currency	56, 57
Building—Pacific Ave.				600.00		
Mandalari Deed of Trust				20,000.00	Currency	65 to 70
Total increase	$35,046.67	$54,390.46	$ 8,500.01	$21,625.37		
DECREASE IN ASSETS						
1940 Hudson	750.00					
Cash on hand		23,247.25				
1130 Victoria St. (residence)		6,000.00				
Fence at 1130 Victoria St.		100.00				
Herrera Deed of Trust		1,902.44				
1946 Pontiac			1,800.00			
Swanson Deed of Trust			567.13	614.56		
Capitola Liquor Store—Part interest				820.03		
Total decrease	$ 750.00	$31,249.69	$ 2,367.13	$ 1,434.59		
*Net Expenditures for Assets	$34,296.67	$23,140.77	$ 6,132.88	$20,190.78		

*Reflected in increase in net worth

Net Worth 12/31/49	$94,286.10
Net Worth 12/31/45	10,525.00
Increase	$83,761.10

Net Increase	
1946	$34,296.67
1947	23,140.77
1948	6,132.88
1949	20,190.78
Total	$83,761.10

p. 11); in 1942 he also worked for a bookie joint (Ex. 7, p. 13); from 1942 to May, 1947, he was employed by the Union Club, and gambled on his own account (Ex. 7, p. 15); since May of 1947 he has had an interest in a liquor store at Capitola, California, and gambled with cards and horses. (Ex. 7, p. 19.) He was known as a pimp and a gambler to the Police Department. (R. 171, 188.)

The income tax returns of the appellant and his wife for the years 1945 to 1949, incl., disclose that the appellant reported as income his salary from the Union Club, partnership income from the Capitola liquor store, and a small amount of miscellaneous income consisting mainly of interest and capital gains. (Exs. 1-6, incl.) The returns for the years 1945 to 1949, incl., were prepared by Eva McNabb. (R. 73.) She asked the appellant if he had any further income, to which his answer was "No." (R. 76, 77.) At the time the returns were prepared, she also discussed with the appellant the fact that gambling income was taxable. (R. 84.)

A net income far in excess of that reported by the appellant on his returns for the years 1946 to 1949, inclusive, was shown by the Government through the use of net worth and expenditure computations. The individual items making up the computations were for the most part stipulated by the appellant. Certain other items, however, were the subject of independent proof. The net worth of the appellant, together with record references in support thereof, and the manner of acquisition was shown as follows (Inserted opposite):

Out of all of the above items, appellant's brief reveals the only item questioned is that of cash on hand. Nor was the expense or other assets of the appellant as of January 1, 1946, shown or even questioned by the appellant, with the single exception of his disagreement with respect to cash on hand.

The officers of the Bureau of Internal Revenue made an investigation to determine whether or not the appellant could have had any cash on hand at the end of the years 1945, 1946 and 1947. They found no evidence of any cash on hand at the end of 1945 (R. 115); however, on December 31, 1946, they were able to determine that the appellant had approximately $23,247.25 in cash on hand, since he sold some property in July 1946 and received cash in that amount before the end of that year, and in view of the fact that the appellant had made no substantial purchases after the sale and before the end of the year 1946. (R. 115.) Included in the investigation which they made in order to ascertain cash on hand was an examination and review of earlier income tax returns filed by the appellant for the years 1940 to 1945, inclusive. They were able to ascertain that the following taxes for those years were paid by the appellant and to compute therefrom the approximate amount of income reported by the appellant for those years. The returns themselves prior to the year 1945 had been destroyed as obsolete files at the time of trial, however the records as to the amount of tax paid were available. (R. 173.) The income computed

therefrom for the years 1940 to 1945, inclusive, is as follows:

Year	*Tax*	*Net Income*
1940	$ 71.84	Less than $5,000.00
1941	160.74	do.
1942	Forgiven	do.
1943	$226.24	$3,899.64
1944	18.80	2,754.00
1945	438.00	3,211.47

No tax is known to have been paid by the appellant prior to the year 1940. (R. 172.)

Chester R. Taynton, internal revenue agent, also investigated the possible receipt by the appellant of money from nontaxable sources such as gifts and inheritances. A search of the county records by Taynton was unfruitful in this respect, and the appellant stated to Taynton that he had not received any gifts, inheritances or nontaxable income. (R. 168.)

As above set out, the Government's evidence disclosed the expenditure by the appellant of large amounts of currency during the years 1946 to 1949, inclusive. These expenditures were far in excess of the total income reported on all of the appellant's income tax returns since 1940. In addition to the uncontroverted proof of net worth and expenditures, the Government produced witnesses who testified to possible sources of the currency used by the appellant in augmenting his physical net worth.

1. Rosario Mandalari testified that he borrowed $20,000 from Campodonico in November of 1949, in

cash. (R. 66.) He also testified that he gambled with the appellant for small stakes in pinochle and "pan" games. (R. 66, 68.) The appellant in the sworn statement which he gave to the examining officers during the course of the investigation on May 4, 1950, stated that he played a little cards once in a while during the period here involved and managed to win consistently (Ex. 7) so that he could "keep the wolf away from the door." (Ex. 7, p. 19.)

2. Eva McNabb testified that she has known the appellant for many years and prepared his returns for the years 1945 to 1949, inclusive. (R. 73.) She received the necessary information from the appellant and from the W-2 Form which she herself had prepared in her capacity as the bookkeeper for the Union Club. (R. 73.) The returns themselves show that no income from gambling was reported by the appellant. (Exs. 1-6, incl.) Mrs. McNabb asked the appellant whether or not he had any other income, and he stated that that was all he had. (R. 77.) She further stated that at the time of the preparation of each of the returns in question she had discussed with Campodonico the fact that income from gambling was taxable. (R. 84, 85.)

3. Joe Gianelli testified that he was the manager of the Union Club during the time that Campodonico worked there and that Campodonico was a floor man, bouncer, and took care of the games when Gianelli was away. (R. 90, 91.) He stated that the club closed in May of 1947, when the town was closed down. (R.

91.) At times when Gianelli was away from the club, Campodonico would make the accounting at the end of the evening with the various dealers for the games and would place the receipts in the safe. The club receipts would be as high as $300 or $400 on some days. (R. 94, 95.)

4. Chester R. Taynton, internal revenue agent, testified at some length as to his investigation of the tax liabilities of the appellant. He asked the appellant for his books and records, but received none (R. 107), and appellant told him he kept none. (R. 169.) He thereupon examined the public records, inquired at all local banks, made an audit of the books of the Capitola liquor store, and questioned the appellant in order to determine his net worth at the end of the years 1945 to 1949, inclusive. (R. 109.) This investigation disclosed the various assets that are set out above in tabular form (*ante,* p. 5), the greater part of which were submitted to the Court by stipulation of the appellant.

In Taynton's conversations with the appellant, the appellant claimed that he had varying sums of cash on hand at the end of the year 1945 but Taynton was unable to find any evidence that the appellant could have had cash on hand at that time. (R. 115.)

Taynton's investigation disclosed that the appellant had no liabilities at the end of any of the years in question. (R. 115.) Non-taxable personal expenditures were estimated by the appellant to Taynton at $60 a month, and taxes paid during the years 1946 to

1949, inclusive, were shown to be nominal in amount. (R. 117.) In computing the appellant's net income on the basis of net worth and expenditures, the amount of $2,200, a nontaxable portion of a capital gain, was allowed. (R. 120, 121.)

Taynton asked the appellant where he got all the money to buy his visible assets when he hadn't reported that much income, and the appellant said he made it gambling; that he was a gambler. (R. 170, 171.)

For the prior years the records of the Bureau of Internal Revenue disclosed that Campodonico had reported nominal amounts of income so that the accumulation of substantial cash by the end of the year 1945 would have been impossible unless it is assumed that the appellant was a tax evader during the prior years. (R. 175.)

In addition to the above independent evidence of the appellant's occupation and financial transactions, there was considerable reliable testimony placed in the record with respect to the appellant's statements and activities during the course of the investigation which clearly indicated his knowledge of guilt and intent to evade his income taxes during the years involved.

1. Margaret B. Rhodes testified that she took and transcribed notes of a statement made by the appellant to the internal revenue agents on May 4, 1950. The statement was placed in evidence as Exhibit 7.

It contains, among other things, appellant's admissions with respect to the assets which he acquired during the years 1946 to 1949, inclusive, which are substantially in accord with the assets discovered by Revenue Agent Taynton during the course of his investigation and with those to which appellant stipulated during the course of the trial. Appellant stated that he worked for the Union Club from 1942 until May or June of 1947 for wages and that he did a little gambling in the club on his own individual account, as a result of which he won quite a bit of money, approximately $25,000 or $30,000. (Ex. 7, p. 15.) He stated that he had about $80,000 in property and cash around the end of 1947. (Ex. 7, pp. 16, 17.) He stated that since May or June of 1947 he had, in addition to his interest in the liquor store at Capitola, played a little cards and the horses, as a result of which he managed to win enough to keep the wolf from the door. (Ex. 7, p. 19.) He stated he had never received any money by way of inheritance or gift (Ex. 7, p. 24) and that his household and living expenses would not run over $60 a month (Ex. 7, p. 29). He lived in a small house which he had purchased at 1130 Victoria Avenue, Stockton, in 1942, for $6,000 until 1947, when he moved to 6009 Pacific Avenue, for which he paid $13,000 and made improvements of approximately $13,000, giving a total cost for the new home of $26,000. He refused to answer whether or not he had received income other than that reported on his returns for the years 1946 and

1947 on grounds of self-incrimination. (Ex. 7, pp. 41, 42.)

With respect to currency accumulations, Campodonico told the agents that he had managed to save considerable cash from his illegal bootlegging, bookmaking and gambling operations in the 1920's and 1930's (Ex. 7, pp. 3, 5, 6, 7, 8, 12) although he never actually counted it. At the end of 1942, he said he had approximately $50,000 buried at his father's place at 925 South Sutter Street (Ex. 7, p. 12); by the end of 1947 he said he had approximately $80,000 in cash and properties (Ex. 7, pp. 16, 17). He later stated that he had around $50,000 in cash, which he placed in his safety deposit box at the Bank of America in 1944, and that from 1944 to 1947 he drew currency out of the box rather than making further deposits. (Ex. 7, p. 18.) He stated that he had not paid income taxes on this money that he had around because he had never heard anything about income tax. (Ex. 7, pp. 38, 39.)

2. Chester R. Taynton, internal revenue agent, first interviewed the appellant on March 27, 1950. (R. 168.) At that time he asked the appellant, in the presence of Mrs. McNabb, where he got all of the money to buy the assets that he had acquired when he hadn't reported that much income. Campodonico told him that he made it gambling. (R. 170.) He stated his occupation to be that of a gambler at that time. (R. 171.)

3. Eva McNabb testified that she had a telephone conversation with the appellant on May 4, 1950, just after he had given his statement to the internal revenue agents, which is in evidence as Exhibit 7. (R. 195.) In response to her question, "How did you come out?" he answered, "Pretty good up until the end," and then said, "Then I mentioned that I made some money gambling," and "I caught hell from Mr. Seaman." (R. 195.)

4. Wareham C. Seaman was called as a witness for the Government. Mr. Seaman is a tax attorney practicing in Stockton, California, and was retained by the appellant as his counsel. (R. 98, 99.) The attorney-client privilege was waived by the appellant with respect to Mr. Seaman's testimony. (R. 153.)

Mr. Seaman accompanied the appellant at the time he made his statement to the internal revenue agents on May 4, 1950, which is in evidence as Exhibit 7. (R. 99.)

Mr. Seaman further testified to a conference which he and appellant had with the internal revenue agents on May 31, 1950, in his office. (R. 139.) Special Agent Atkins presented the transcript of the statement that Campodonico had made to the agents on May 4, 1950, and asked him to sign it. (R. 141.) Mr. Campodonico stated that he refused to sign the statement because it did not represent the truth, and when Atkins requested that Campodonico make another statement of what would be the truth, the appellant refused on the advice of Seaman.

Seaman further testified that the appellant made a deposition in another Court proceedings on March 27, 1951. (R. 142.) In that deposition Campodonico admitted that he told Seaman that he made money gambling during the years 1943 to 1951 which he did not report on his income tax returns. (R. 146, 147.)

The attorney-client privilege was waived by the appellant with respect to the testimony of Mr. Seaman during cross-examination (R. 153) and, on redirect examination, Mr. Seaman testified that Campodonico made four conflicting statements to him with respect to the source of his visible increase in net worth. His first position was that this money had been accumulated from gambling, prostitution and bootlegging prior to 1943. (R. 157.) His second was that he had accumulated all but $45,000 of his visible increase in net worth prior to 1943 from prostitution, gambling and bootlegging, and that subsequent to 1943 and until May of 1947 the remainder of such visible increase was derived from funds which he had embezzled from the Union Club. (R. 158.) His third position was that all of the visible increase in net worth had been embezzled from the Union Club (R. 158), and his fourth position was that $40,000 of his visible increase in net worth had come from his gambling activities in 1943 through 1949 (R. 158). The latter three positions taken by the appellant were subsequent to the statement which he gave to the officers of the Bureau of Internal Revenue on May 4, 1950. (R. 159.)

5. Eva McNabb testified as to the telephone conversation which she had with the appellant on or about May 31, 1950, at the time when he refused to sign the statement in evidence as Exhibit 7. The appellant told her at that time that he refused to sign the statement; that Mr. Seaman would not let him sign the statement because they were going to use embezzlement as their defense. She then asked him whom he embezzled the money from, and he said he embezzled it from the Union Club—Harry Hill, his employer. She then asked him if he intended to pay it back and he said ' "Hell, no" '. She further testified that she kept the books of the Union Club during the period that Campodonico was employed at that establishment but had never found any evidence that he had embezzled any moneys. (R. 196.)

6. Joe Gianelli, the manager of the Union Club, testified that the receipts of the club were normal during the times that Campodonico assumed the managerial duties. (R. 202, 203, 207, 211.)

At the close of the Government's case, the defense introduced records of safety deposit boxes held by the appellant and/or his wife during the years 1936 to 1951 (R. 299, 300), and a stipulation was made that the appellant sold a boat on September 3, 1942, for $2,000. The appellant did not take the stand and did not present further evidence.

QUESTIONS PRESENTED IN THIS CASE.

(1) Is the evidence sufficient to support a verdict of guilty on Counts 1, 2, and 3 of the indictment?

(2) Was there sufficient proof of a corpus delicti to warrant admission of the testimony of the agents of the Bureau of Internal Revenue, Wareham C. Seaman, and Eva McNabb concerning statements made to them by the appellant?

(3) Is the delay of 14 months between the start of the trial to the Court, the jury having been waived, and the pronouncement of judgment a denial of an appellant's right to a speedy trial, in violation of the Sixth Amendment to the United States Constitution?

ARGUMENT.

I. THE EVIDENCE SUPPORTS THE VERDICT OF GUILTY AS TO THE FIRST THREE COUNTS OF THE INDICTMENT.

A. SCOPE OF REVIEW OF APPELLATE COURT.

It is a well-established principle that an Appellate Court will indulge in all reasonable presumptions in support of the ruling of a trial Court, and therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F. 2d 681 (C. C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th), cert. den. 344 U.S. 817;

Bell v. United States, 185 F. 2d 302, 308 (C.A. 4th), cert. den. 340 U.S. 930;

Gendelman v. United States, 191 F. 2d 993 (C.A. 9th), cert. den. 342 U.S. 909.

The proof in a criminal case need not exclude all possible doubt but "need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt."

Henderson v. United States, 143 F. 2d 681 (C. C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th), cert. den. 344 U.S. 817.

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue. Wigmore on Evidence (3d ed. 1940), Sec. 2497, p. 324.

An Appellate Court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial Court.

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 154;

Gendelman v. United States, 191 F. 2d 993 (C. A. 9th), cert. den. 342 U.S. 909.

In connection with circumstantial evidence, this Court in

Stoppelli v. United States, 183 F. 2d 391 (C.A. 9th), cert. den. 340 U.S. 864,

has recently stated the rule to be as follows at page 393:

> "The testimony of the fingerprint expert was sufficient to go to the jury if its nature was such that reasonable minds could differ as to whether inferences other than guilt could be drawn from it. It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence. Curley v. United States, 81 U.S. App. D.C. 229, 160 F. 2d 229, 230. In the cited case, Judge Prettyman pertinently observes: 'If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case.' 160 F. 2d at page

233. See also United States v. Perillo, 2 Cir., 164 F. 2d 645."

See also:

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th), cert. den. 344 U.S. 817;

Gendelman v. United States, 191 F. 2d 993 (C. A. 9th), cert. den. 342 U.S. 909;

Davena v. United States, 198 F. 2d 230 (C.A. 9th), cert. den. 344 U.S. 878;

Barcott v. United States, 169 F. 2d 929 (C.C.A. 9th), cert. den. 336 U.S. 912.

Pursuant to the provisions of Rule 23, Federal Rules of Criminal Procedure, the appellant waived a jury trial in writing. (R. 30.) No request to find the facts specially was made by the appellant under the provisions of Rule 23(c), Federal Rules of Criminal Procedure.

The scope of review of the Appellate Court with respect to the trial of a case by the Court sitting without a jury appears to be generally the same as in those cases wherein a jury verdict has been rendered, at least insofar as criminal cases are concerned. *Cf. Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83; *Henderson v. United States,* 143 F. 2d 681 (C.C.A. 9th); *Danziger v. United States,* 161 F. 2d 299, cert. den. 332 U.S. 769; *Jabczynski v. United States,* 53 F. 2d 1014, 1015 (C.C.A. 7th, 1931), cert. den. 285 U.S. 546.

In the latter case, appellants were charged with violation of the National Prohibition Act. After deciding that there had been a proper waiver of a jury trial by the appellants, the Circuit Court stated as follows:

> "The second question presented is whether or not there is evidence to support the finding of the trial court. * * * There is evidence tending to establish the guilt of the defendants, as charged in the indictment, and there is also evidence given by the defendants tending to establish their innocence of those charges.
>
> "No good purpose will be served by discussing at length the testimony of the various witnesses. A careful examination of all the testimony convinces us that there is evidence from which the trial judge was justified in arriving at the conclusion that the defendants are guilty as charged. Having thus determined, this court cannot disturb such finding. Burton v. United States, 202 U.S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Harley v. United States (C.C.A.) 269 F. 384; Allen v. United States (C.C.A.) 4 F. (2d) 688."

Further, the principle that where the trial Court sits without a jury in a criminal case, all questions of credibility of witnesses are for his determination and for his determination alone.

> *Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

Danziger v. United States, 161 F. 2d 299, cert. den. 332 U.S. 769;

Newman v. United States, 156 F. 2d 8, cert. den., sub. nom.;

Cain v. United States, 329 U.S. 760, 91 L. Ed. 655, 67 S.Ct. 115.

Furthermore, in criminal cases where a jury has been waived by the appellant, the usual rule obtains that the Appellate Court is not concerned with the weight of the testimony adduced in the trial Court, since all questions of credibility are for the trial Court.

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

Newman v. United States, 156 F. 2d 8, cert. den., sub. nom.

An important difference, however, in the scope of appellate review where a criminal case is tried without a jury is found in the presumption that the trial judge considers only competent evidence in arriving at his verdict.

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 385 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

Hoffman v. United States, 87 F. 2d 410, 411.

Since no request was made by the appellant for a finding of the facts specially as provided by Rule 23(c), Federal Rules of Criminal Procedure, the circuit Court must state the facts, where supported by

the evidence, as those which would support the judgments. *Blunden v. United States*, 169 F. 2d 991, 992, and cases therein cited.

In the statement of facts in the appellant's brief, beginning at page 11, it is obvious that appellant has paid no attention whatsoever to the rule as clearly set out in the above cited cases that the evidence must be considered in the light most favorable to the prosecution. Appellant, for the most part, sets out portions of the testimony of various witnesses and by far the greater part of the excerpts consists of testimony given under cross-examination by appellant's counsel in response to leading questions. It is clear that appellant considers the facts in the light most favorable to the appellant and not to the Government, and this reversal of viewpoint runs throughout the thread of the argument set out in the brief as well as in the alleged statement of facts.

B. SINCE THE SENTENCE IMPOSED, INCLUDING THE FINE, DID NOT EXCEED THAT WHICH MIGHT LAWFULLY HAVE BEEN IMPOSED UNDER ANY SINGLE COUNT, THE JUDGMENT UPON THE VERDICT MUST BE AFFIRMED IF THE EVIDENCE SUSTAINS THE CONVICTION ON ANY ONE COUNT.

The appellant was sentenced to eighteen months imprisonment on Counts 1 and 2, the sentence to run concurrently, and, in addition, the appellant was fined the sum of $5,000 on Count 1, plus Court costs. No sentence was imposed on Count 3.

It has long been the rule that if the sentence imposed did not exceed that which might lawfully have

been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts.

Abrams v. United States, 250 U.S. 616, 619;
Pierce v. United States, 252 U.S. 239, 252, 253;
United States v. Trenton Potteries, 273 U.S. 392, 401, 402;
Sinclair v. United States, 279 U.S. 263, 299;
Whitfield v. Ohio, 297 U.S. 431, 438;
Norwitt v. United States, 195 F. 2d 127 (C.A. 9th), cert. den. 344, U.S. 817.

The concurrent sentences of eighteen months on Counts 1 and 2 and the fine of $5,000 on Count 1 were within the maximum specified for any one count in 26 U.S.C.A., Section 145(b), which is five years imprisonment or $10,000 fine, or both, together with cost of prosecution.

C. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE DETERMINATION OF THE TRIAL COURT THAT INCOME WAS WILLFULLY OMITTED BY THE APPELLANT FROM HIS INCOME TAX RETURNS FOR THE YEARS 1946 AND 1947.

(1) The Government was entitled to rely upon proof of income by the methods of net worth increase and expenditures.

The appellant raises as one of the questions presented in this appeal the right of the Government to rely on the use of the net worth and expenditures methods of computation of taxable income. It does not appear that this question is the subject of further argument in his brief, however. The testimony of Revenue Agent Taynton is that he asked the appel-

lant for his books and records at the initiation of the investigation and the appellant stated he kept none. (R. 107.)

It is clear that where the books and records of a taxpayer are inadequate or, as in this case, nonexistent, the Government has a right to compute income on the basis which it determines most likely to reflect true income. Title 26, U.S.C.A., Section 41; *Remmer v. United States,* 205 F. 2d 277, (C.A. 9th 1953).

After all, evidence of net worth and expenditures constitutes circumstantial evidence of the commission of the crime, and it has long been the ruling that circumstantial evidence is permissible in criminal cases in this country.

Peace v. United States, 278 Fed. 180 (C.C.A. 7th 1921);

Thacker v. United States, 155 F. 2d 901 (C.C.A. 5th 1946);

Rumely v. United States, 293 Fed. 532, cert. den. 263 U.S. 713 (C.C.A. 2d 1923);

Gleckman v. United States, 80 F. 2d 394 (C.C. A. 8th 1935), cert. den. 297 U.S. 709.

(2) There was sufficient evidence of an increase in net worth and of expenditures not accounted for by reported income to sustain the determination of the trial Court that the appellant received income during the years 1946 and 1947 which he did not report on his income tax returns.

(a) The Government proved an increase in net worth.

The Government presented evidence of a net worth increase of the appellant during the years 1946 and 1947 which was far in excess of the nominal amounts of income which he reported on his returns for those years. This evidence, likewise, showed heavy expenditures in cash by the appellant which, again, were far in excess of the net income reported on the returns. No dispute exists as to any of the items making up the net worth statement of appellant at the beginning of the year 1946 or at the end of the year 1946 and at the end of the year 1947 with the single exception of cash on hand. Indeed, the larger part of the items making up the net worth and non-deductible expenditures of the appellant was stipulated at the beginning of the trial. (R. 44 to 64, incl.) The net worth of the appellant with record references in support thereof is set out in a schedule on page 5, *ante.*

An unexplained increase in net worth establishes a prima facie case of understatement of income. *United States v. Hornstein,* 176 F. 2d 217, 220 (C.A. 7th 1949); *Schuermann v. United States,* 174 F. 2d 397 (C.A. 8th 1949); *Bell v. United States,* 185 F. 2d 302 (C.A. 4th 1950). Net income may be proved by showing expenditures, purchases and investments during the taxable period. *United States v. Johnson,* 319 U.S. 503, 517; rehearing denied 320 U.S. 808; *United*

States v. Skidmore, 123 F. 2d 604 (C.C.A. 7th); cert. den. 315 U.S. 800.

(b) The Government proved beginning net worth as of December 31, 1945.

The individual items making up the net worth were for the most part stipulated by appellant. The remaining items were the subject of independent proof. Of all the items comprising the net worth, appellant's brief only questions the lack of a cash on hand item as of December 31, 1945. No evidence of any kind was introduced by the appellant to the effect that he had other or additional assets on January 1, 1946, or other or additional assets on December 31, 1946, and December 31, 1947. The examining officers testified that they found no other assets, and the further fact that the appellant was willing to stipulate as to the correctness of the Government's figures on all of these assets indicates that the examining officers' search was exceptionally thorough and its results exceptionally complete.

No, the appellant does not question the visible assets making up the net worth of the appellant at the end of the pertinent years. He questions only that invisible, intangible, unreachable asset, cash on hand. He makes the stock defense that he had in some way accumulated vast sums of money from his past activities and, squirrel-like, hid this immense fortune away until the years 1946 to 1949, inclusive, when he decided to spend it all. Peculiarly enough, he was thereupon indicted for the years 1946 to 1949, inclusive, the same years that he decided to spend all his money.

The trial Court in its memorandum and order adjudging the appellant guilty as charged had this to say with respect to the Government's proof of income by the net worth and expenditure methods:

> "The Government proceeded on the net worth theory showing expenditures during the tax years greater than the income reported by the defendant. The defendant challenges the beginning net worth in that it makes no allowance for cash on hand by the defendant. While there may be some question as to the mathematical exactness of the beginning net worth of the defendant it is sufficient to sustain the Government's position particularly in view of the fact that the defendant kept no books or records and did not offer to explain the difference between expenditures and income for the tax paid. This question has recently been disposed of in the case of Remmer v. United States (CA-9) 205 Fed. (2d) 277, decided May 28, 1953. The Court said 'In the instant case the Government thoroughly investigated appellant's potential sources of net worth. It was not incumbent upon the prosecution to prove appellant's net worth to a mathematical certainty before the case could be submitted to the jury. As the Fourth Circuit said in Bell v. United States, 185 Fed. 2d 302 (4th Cir. 1950), cert. denied 340 U.S. 930: "An estimate of the taxpayer's net worth as the means of determining his income is resorted to in the absence of accurate records which it is his duty under the statute to make and to preserve, *and by its very nature it is an approximation;* but it has been held in this and other jurisdictions to be an appropriate method to support a criminal prosecu-

> tion under the statute * * *'' (Emphasis added.) 185 F. 2d at 308. See also Gariepy v. United States, 189 F. 2d 459 (6th Cir. 1951); Schuermann v. United States, 174 F. 2d 397 (8th Cir. 1949, cert. denied 338 U.S. 831.' ''

The appellant did not see fit to take the stand and put before the Court his testimony that he had sufficient cash on hand on December 31, 1945, to account for the large increase in net worth and the large amount of expenditures in excess of his reported income. The appellant did not see fit to introduce any evidence that he had additional assets at the beginning of the year 1946, assets which were not accounted for in the Government's computation of his net worth. No, the appellant argues that the Government is required to prove a negative and not merely to prove one negative but to prove thousands of negatives.

It was the trial Court's determination from all of the evidence presented that there was sufficient proof on the part of the Government to show that some of the excess of money spent by the appellant over that reported on his income tax return was from current income. Since the Appellate Court will not look into the weight of the evidence, it is sufficient if there is evidence in the record to sustain the trial Court's determination as to this point.

The examining officers testified that they made an investigation but could find no evidence that the appellant had cash on hand as of December 31, 1945.

The appellant himself in his statements to the examining officers and to various witnesses who testified at the trial was so inconsistent as to the amounts of money he had on hand at any particular time that from the very manner in which he contradicted himself over and over again it can be inferred that a substantial portion of the net worth increase and of unaccounted-for expenditures could be from nothing but current and unreported income. Indeed, in numerous places in his brief the appellant points out that he is an accomplished perjurer. In essence, his argument is, "I am a perjurer; you can't believe me, and you can't prove how much cash on hand I had or did not have and, therefore, my perjury to agents of the Bureau of Internal Revenue prevents my conviction in this case." Contradictory statements of the appellant in themselves not only show knowledge of a guilty intent to evade taxes but are evidence in themselves that he was in receipt of taxable income during the years 1946 and 1947 which he did not report. It is noted that in this light it would not be considered as admissions of the appellant but, rather, as prime and direct evidence of the receipt of unreported income.

Cited by the appellant in his brief are those twin decisions, *Bryan v. United States,* 175 F. 2d 223 (C.A. 5th, 1949) and *United States v. Fenwick,* 177 F. 2d 488 (C.A. 7th, 1949), which have always been found distinguishable by later cases in the circuits which rendered them and by the other Courts of appeal. These cases hold that there must be some evidence in

net worth and expenditure cases to preclude the possibility that the alleged unexplained expenditures were made from accumulated prior earnings. Other authorities would appear to take the view that the various possibilities of source, other than that of current earned income, are matters of defense particularly within the knowledge of the defendant, and it is not necessary to preclude them in order for the Government to establish a prima facie case or at least that only slight evidence in this respect is required. In *Remmer v. United States,* 205 F. 2d 277, 287 (C.A. 9th, 1953), this Court stated, "If a defendant could prevent a case of this kind from being submitted to the jury merely by stating he had further assets not taken into consideration by the Government, yet refusing to disclose them, enforcement of the tax evasion provisions of the Internal Revenue Code would be completely frustrated," and in *United States v. Hornstein,* 176 F. 2d 217, 220 (C.A. 7th, 1949), the Court stated, "Evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income. It is then incumbent on the defendant to overcome the logical inferences to be drawn from the facts proved." See also *Schuermann v. United States,* 174 F. 2d 397 (C.A. 8th, 1949); *Bell v. United States,* 185 F. 2d 302 (C.A. 4th, 1950).

It is apparent that appellant in this case takes the same position that the appellant took in the case of *Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 379 (C.C.A. 9th, 1948):

"While the appellants professedly recognize the rule that the Government must prove its case beyond a *reasonable* doubt, their briefs are replete with expressions which seem to indicate that in reality the standard actually insisted upon is that the appellee's evidence should remove all *possible* doubt.

While in other portions of their briefs the appellants do complain that the Government failed to adduce certain affirmative evidence, their insistence also upon the lack of *negative* evidence indicates that they are holding the appellee to too strict a standard of proof; namely, the proof of several negatives.

In Henderson v. United States, 9 Cir., 143 F. 2d 681, 682, we said:

'The proof in a criminal case need not exclude all doubt. If that were the rule, crime would be punished only by the criminal's own conscience, and organized society would be without defense against the conscienceless criminal and against the weak, the cowardly and the lazy who would seek to live on their wits. The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt.'

See also Rose v. United States, 9 Cir., 149 F. 2d 755, 759."

Taking appellant's contention literally, it is that the Government must show that the appellant did not have cash in his pocket, and that after they show that they must show that he did not have cash in his safety deposit box, and, after that, that he did not

have cash in his attic, and, after that, that he did not have cash under his mattress, and, after that, that he did not have cash buried in the yard, and so on ad infinitum. This is, indeed, the invincible barrier to proof referred to in *United States v. Johnson,* 319 U.S. 503, 518 (1943).

The *Bryan* and *Fenwick* cases appear to constitute questionable authority in their own circuits. The *Fenwick* case was overruled by the Seventh Circuit in the case of *United States v. Yeoman-Henderson, Inc.,* 193 F. 2d 867 (C.A. 7th, 1952), and it further appears to be in conflict with the prior case of *United States v. Hornstein,* 176 F. 2d 217 (C.A. 7th, 1949). The recent case of *Pollock v. United States,* 202 F. 2d 281 (C.A. 5th, 1953) severely limits the *Bryan* case. The *Bryan* case contains a dissenting opinion by Judge McCord, which has generally been more highly regarded and cited than the majority opinion:

> "The majority predicate their reversal on the sole ground that the evidence was insufficient to make out a prima facie case against the defendant on a net worth-expenditure basis, for the reason that the testimony of the government auditor did not expressly exclude the hypothesis that some of the large expenditures by defendant '*might have been* from sources other than current business income.' This is sheer speculation and conjecture, and an unwarranted presumption in favor of defendant's innocence after he has been fairly tried and convicted. Moreover, it is an unreasonable hypothesis which has already been rejected by the jury as manifestly incredible and unworthy of belief. The ultimate

effect of the decision is to shackle the government to a practically insurmountable burden of proof in net worth-expenditure cases concerning matters which are peculiarly within only an evading defendant's knowledge.

In all cases, such as here, where a defendant has either destroyed his records, or they are otherwise unavailable, the government must of necessity resort to other indirect methods of proving unreported income, such as (1) by an analysis of the defendant's bank deposits; (2) by showing an increase in net worth on the net worth-expenditure basis; or (3) by evidence of purchases, expenditures and investments made during the tax years on which the prosecution is based. Many tax offenders of the worst type would go unwhipped of justice if the government were not allowed to establish unreported taxable income by this type of circumstantial evidence. Each of the above methods is predicated upon the sound legal proposition that evidence of a large amount of unexplained funds or property in the hands of a defendant during the tax years under scrutiny establishes a prima facie case of understatement of income during that period. * * * It is then incumbent upon the defendant to go forward and offer proof in explanation of this unreported excess income, much in the same manner as would be required under the 'possession of recently stolen goods' rule. * * *

The usual contention on behalf of a defendant in this type of case is that the unexplained increase in net worth results from expenditure of funds accumulated and secreted in earlier years, for which tax prosecutions are then barred by the

> statute of limitations. Obviously, because of the difficulty and inaccessibility of such proof, the Government could not possibly wholly rebut such a contention, as only the defendant himself knows whether the defense is made in good faith. In such instances, after the Government has offered all proof available, the defendant should not be permitted to stand silently by and thwart a conviction on the claim that a failure to prove unknown assets does not satisfy net worth requirements. Manifestly, the truth and good faith of such a defense is for the jury alone."

This Honorable Court has several times indicated the questionable authority of the *Bryan* and *Fenwick* cases and in *Remmer v. United States,* 205 F. 2d 277 (C.A. 9th, 1953), commented at pages 287 as follows:

> "Reliance is placed by appellant upon the cases of Bryan v. United States, 5 Cir., 1949, 175 F. 2d 223, and United States v. Fenwick, 7 Cir., 1949, 177 F. 2d 488, where judgments of conviction were reversed because of the insufficiency of the evidence. This court, in Davena v. United States, 9 Cir., 1952, 198 F. 2d 230, 231, questioned the 'vitality' of the Fenwick case, and the majority opinion in the Bryan case was accompanied by a strong dissent. Although these decisions may well have been appropriate because of the particular facts there involved, we believe the general language of the opinions too narrowly limited the function of the jury as the triers of fact."

In the case of *McFee v. United States,* 206 F. 2d 872 (C.A. 9th, 1953), the rule is adhered to that the

amount and sufficiency of evidence to preclude the possibility that a defendant's income computed on the net worth basis may have resulted from a non-income source should be left largely to the trial judge.

> "There is no exclusive set of circumstances to foreclose the prior accumulation hypothesis. How much evidence must be offered by the prosecution before the trial court can properly submit the case to the jury depends upon the facts of the particular case. Remmer v. United States, 9 Cir., 1953, 205 F. 2d 277. The Government is not required to refute all possible speculations as to the sources of funds from which the expenditures might have been made. Gariepy v. United States, 6 Cir., 1951, 189 F. 2d 459. We view the evidence in the light most favorable to the Government and affirm if the evidence is sufficient to justify the jury in finding therefrom, beyond a reasonable doubt, that there has been a wilful attempt to evade taxes. Gendleman v. United States, 9 Cir., 1952, 191 F. 2d 993. *Id.* at p. 874."

The appellant cites the recent case of *Calderon v. United States,* 207 F. 2d 377 (C.A. 9th 1953) and statements therein as to cash on hand. In the *Calderon* case, the Government, in establishing the beginning net worth, attempted to prove a cash on hand item by extrajudicial admissions of defendant Calderon. This honorable Court held that such extrajudicial statements could not be the basis of a conviction absent some independent proof of the corpus delicti. In the case at bar, the Government made no attempt to prove the opening net worth by extra-

judicial admissions of the appellant. The appellant stipulated to a majority of the items of the opening net worth, which totalled $10,525.00. Appellant now, while not objecting to the items making up this $10,525.00, contends that the Government has to prove that he had no cash on hand. Thus, appellant does not attack the sufficiency of what the Government proved but attacks the beginning net worth on the basis that the Government did not prove that appellant did not have other assets, specifically cash on hand. This is clearly not the holding in the *Calderon* case.

To follow appellant's argument to its logical conclusion would inflict an impossible burden of proof on the Government. It would logically follow that the Government would have to affirmatively prove that defendant did not have any stocks, that he did not have any bonds, that he did not have any other valuables or securities. To prove this, the Government would have to show that a defendant did not own stock in Company "A", in Company "B", and so on, ad infinitum. This argument defeats itself when carried out to its logical conclusion, which is an absurdity. No, the *Calderon* case and the law require that the proof offered by the Government be sufficient to sustain a conviction. To argue otherwise would in effect require that the prosecution in every criminal case produce affirmative evidence in making their prima facie case which would disprove every possible alibi that the defendant might offer. This is clearly not the law.

The Government carried its burden of proof in proving the opening net worth. The investigating agents testified that they examined all the public records (R. 109), inquired at all local banks (R. 109, 113), made an audit of the books of the Capitola Liquor Store (R. 109), and made an investigation to determine appellant's beginning net worth. (R. 108, 109, 115.) The Government agents thoroughly investigated and explored every avenue which might reasonably lead to assets and cash in the hands of the appellant and determined at the conclusion of their investigation that appellant owned assets in the cost value of $10,525.00 as of December 31, 1945. In addition, the Government agents investigated appellant's past filing record of income tax returns. There was no record of income taxes having been paid by appellant prior to the year 1940 (R. 172) and the tax paid for the years 1940 to 1945, inclusive, indicated that appellant never reported taxable income in excess of $5,000 a year. (R. 173, 175.) Thus, an exhaustive investigation by Government agents, together with the record of appellant's previous income tax returns, proved conclusively that appellant did not have a prior accumulation of assets to account for the proven increase in net worth of $57,437.44 for the years 1946 and 1947.

It is the Government's contention that the evidence introduced at the trial conclusively proved that appellant had a beginning net worth of $10,525.00. However, even if it be assumed that the Government did

not conclusively prove beginning net worth, there is no doubt that the evidence introduced by the Government established a prima facie case of unreported income and that it was in the province of the Judge, as trier of the facts, to determine if the increase in net worth was unreported income, and whether there was intent to evade the tax on such unreported income.

(3) There was sufficient evidence as to the source of the unreported income to sustain the determination of the trial Court that the increase in net worth represented taxable income.

The appellant complains that a lucrative source of income has not been established. It apparently is his contention that the Government must prove specific unreported income earned from a specific provable source. Here again the appellant attempts to build up the burden of proof to an insurmountable barrier. The net worth method is used for the very reason that direct evidence is not available to prove specific unreported income and, therefore, of necessity, the Government must rely on circumstantial evidence to prove its case.

The Government is not required to prove specific unreported income or a specific source of unreported income. In the recent case of *McFee v. United States,* 206 F. 2d 872 (C.A. 9th 1953), this Court had occasion to consider a question of source in an income tax evasion case and stated at page 874:

> "The Government is not required to refute all possible speculations as to the source of funds from which the expenditures might have been

made. *Gariepy v. United States,* 6 Cir. 1951, 189 F. 2d 459."

and further on page 875 stated:

"The law is clear that proof of the exact amount or precise source of unreported income is not required. *Jelaza v. United States,* 4 Cir. 1950, 179 F. 2d 202; *Gariepy v. United States,* 6 Cir. 1951, 189 F. 2d 459. The jury was entitled to infer from the evidence that the unreported income came from one or all of the sources specified in the bill of particulars."

The Government, therefore, need not prove an exact source but must introduce evidence of a possible source. The Court in *Pollock v. United States,* (C.A. 5th 1953), 202 F. 2d 281, quotes with approval the instructions of the trial Court in a footnote at page 285 in which it is stated:

"The increase, if any, in net worth is presumed to be net income if certain conditions obtain. They, are, one, that there is evidence of a *possible source* or *sources of income* to account for the expenditures or the increased net worth; * * *" (Italics supplied.)

In the case at bar, there is evidence of several possible sources of unreported income. There is testimony in the record that appellant was well known as a gambler during the years involved (R. 171 and 188); that he worked in a gambling house during 1946 and part of 1947 (R. 91); that he gambled during the years involved (R. 66 and 68); that he had access to large sums of money (R. 94 and 95); and that he was

engaged in the liquor business, in partnership with his brother during the years 1947 to 1949, inclusive. There are also the admissions of defendant under oath to agents of the Bureau of Internal Revenue, that during all of the years 1946 to 1949, inclusive, he gambled and made money from that avocation. (Exhibit 7, pages 15 and 19.) On appellant's tax returns for the years 1945 to 1949, inclusive, no income from gambling is shown.

Income obtained from gambling or illegal sources is taxable.

Rutkin v. United States, 343 U.S. 130, 72 S. Ct. 571 (1952);

United States v. Johnson, 319 U.S. 503, rehearing denied 320 U.S. 808;

United States v. Sullivan, 274 U.S. 259;

Benetti v. United States, 97 F. 2d 263 (C.C.A. 9th 1938).

It is apparent that Judge Carter, after hearing the evidence, believed that the increase in appellant's net worth represented taxable income and that it came from one or all of the possible taxable sources indicated above.

(4) There was sufficient evidence of intent to sustain the determination of the trial Court that the appellant willfully evaded his and his wife's income taxes for the years 1946 and 1947.

The Government established beyond a reasonable doubt that appellant willfully intended to evade his taxes. The Government proved, by a search of the records of the Bureau of Internal Revenue, that appel-

lant had not filed a return before the year 1940 and from 1940 to 1947, inclusive, never reported any substantial income. (R. 172 to 175, inclusive.) Proof was introduced to show that during the years 1946 and 1947, while reporting only a small amount of income, appellant acquired a large amount of assets. (R. 42 to 63, inclusive, 108 to 122, inclusive.) The Government further proved that appellant was a gambler (R. 66, 171, 188), that he gambled during the taxable years 1946 and 1947 (R. 66, 68, Exhibit 7, pages 15 and 19), that he worked in a gambling establishment (R. 91), that he made conflicting statements concerning the source of his income (R. 157, 158, 159, 170, 195), and that he did not keep any books or records. (R. 107.)

Judge Carter in his memorandum and order of June 13, 1953, found that the conduct of appellant was willful and stated:

> "The defendant also contends that there was no fraudulent conduct on his part which could sustain a finding of wilfullness. The evidence shows no substantial income for a number of years prior to the tax period; expenditures during the tax period greater than the reported income for that period; failure to keep books and records; working in a gambling establishment during the tax periods; and conflicting admissions to the Government agents concerning the source of the money spent by defendant in excess of his reported income for the tax period. This picture fits the rule laid down in Remmer v. United States (supra) where it was said, 'Appellant argues in his reply brief that even if there

was sufficient evidence to show a tax deficiency there was no evidence of fraud. A state of mind can seldom be proved by direct evidence but must be inferred from all the circumstances. A wilful intent to evade income taxes may be inferred from such factors as appellant's failure to include a substantial amount of income on his and his wife's tax returns, the failure to keep adequate books which would clearly reflect income, and the concealment of the ownership of property such as a safe deposit box, real estate interests, and business licenses. These factors, all present in the instant case, are but part of a general pattern of conduct engaged in by appellant from which the jury could infer the requisite intent. See Norwitt v. United States 195 F. 2d 127, 132 (9th Cir. 1952).' "

The appellant does not argue this point and thus, apparently concedes that Judge Carter correctly decided the intent issue. In taking no exception to the Court's findings on willfulness, the appellant in effect admits that the Government has proved the willful intent to evade the tax. He objects to the decision of the Court only on alleged defects in technical proof of net worth.

II. THERE WAS SUFFICIENT PROOF OF THE CORPUS DELICTI TO WARRANT ADMISSION INTO EVIDENCE OF THE EXTRAJUDICIAL STATEMENTS OF THE APPELLANT.

This honorable Court has had occasion to consider the question of the admission of extrajudicial statements in three rather recent cases. In the case of

Davena v. United States, 198 F. 2d 230 (C.A. 9th 1952), cert. den. 344 U.S. 878, it was held that evidence corroborating the conviction need not independently prove the commission of the crime charged. This Court at page 231 of 198 F. 2d 230 stated:

> "It is now urged upon us that these extra-judicial statements of the defendant were improperly admitted into evidence because the crime was not proved independently of them, and thus that United States v. Fenwick, 7 Cir., 177 F.2d 488 requires a reversal. Whatever vitality the Fenwick case has in the light of United States v. Hornstein, 7 Cir., 176 F. 2d 217 which preceded it and appears to be in conflict, and United States v. Yeoman-Henderson, Inc., 7 Cir., 193 F. 2d 867, which strictly limits the Fenwick case, it is of no relevance in this circuit since here it is established that the evidence corroborating a confession of the defendant need not independently prove the commission of the crime charged, neither beyond a reasonable doubt nor by a preponderance of proof. This being the case, the admissions of the defendant which were fully corroborated were properly given to the jury."

In the case of *Spriggs v. United States,* 198 F. 2d 782 (C.A. 9th 1952), this Court reversed a conviction on the grounds that there was no independent evidence to substantially corroborate the admission of the defendant and cited the *Davena* case as an expression of the correct law. In the very recent case of *McFee v. United States,* 206 F. 2d 872 (C.A. 9th 1953), this Court in affirming the conviction observed at page 878:

> "A reading of the record convinces us that not only does the independent evidence substantially corroborate the admissions, which in this circuit is sufficient, Davena v. United States, 9 Cir., 1952, 198 F. 2d 230, but, contrary to appellant's contention, goes further and establishes the *corpus delicti* by competent independent evidence."

This honorable Court, therefore, agrees with the views expressed by Judge Learned Hand in *Daeche v. United States,* 250 F. 566, 517 (C.C.A. 2d 1918) and requires that there must be independent evidence to substantially corroborate admissions or confessions of a defendant, but that such independent evidence need not independently prove the commission of the crime charged.

In the case at bar, there is ample independent evidence not only to corroborate the several extrajudicial statements made by appellant but to establish the corpus delicti independently.

The Government proved an increase in appellant's net worth in the amount of $57,437.44 during the years 1946 and 1947 by testimony of competent witnesses and by stipulation, and this is not attacked in appellant's brief. The investigating agents testified that they made a thorough investigation and that their investigation showed that taxpayer had a large unaccounted for and unreported increase in net worth for the years 1946 and 1947. (R. 109 and 236.) Testimony was introduced that appellant was known as a gambler. (R. 171 and 188.) Witness Mandalari testified that appellant gambled with him in card

games. (R. 66.) Witnesses McNabb and Gianelli testified that appellant was employed in a gambling establishment in 1946 and part of 1947, (R. 77, 91, 93) and witness Gianelli testified that appellant had access to large sums of cash. (R. 95, 96, 97.)

It was, therefore, proved by independent evidence that taxpayer had a large unaccounted for increase in net worth during 1946 and 1947. It was further shown that appellant was a gambler and although spending large amounts of money and acquiring considerable property, kept no books and records of his financial dealings. The evidence showed that appellant suddenly appeared affluent in the years 1946 and 1947 and purchased several automobiles, a boat, a liquor store and a new home. (R. 52-58, incl.) It is submitted that this is most potent evidence that appellant received substantial income during these years and willfully failed to report it on his tax returns, thus intending to evade the tax. It is more than sufficient to corroborate his extrajudicial statements.

It is the position of the Government that the corpus delicti was established by competent independent evidence and that the admissions would be admissible even under the strict rule of the *Fenwick* case. There is certainly sufficient independent evidence to substantially corroborate the admissions, as is required by the *Davena* case. It is further the position of the Government that the extrajudicial statements of appellant were not necessary to, nor were they used to prove any essential element of this case. They were not used to prove receipt of any income or to establish

appellant's opening net worth. They were used, along with other evidence, to show that gambling was one of the possible sources of appellant's net worth increase. Therefore, even if the extrajudicial statements were inadmissible, it would in no way affect the proof in this case in that the Government by independent evidence proved several other possible sources of income. In fact, independent evidence was also introduced to show that appellant gambled. (R. 66, 68.)

The appellant's brief states over and over again that the statement of the appellant was conclusively established to be untrue. The Government vigorously disagrees with such conclusion. The testimony of Eva McNabb as to conversations had with appellant after he made the statement to the agents (R. 195) and after he refused to sign the statement (R. 196), is most potent evidence that the statement was true. The logical conclusion to be drawn from the unchallenged testimony of Eva McNabb is that appellant made a tactical mistake in admitting gambling income and was trying to recover his fumble by later denying such income. After refusing to sign the statement, the Government agents requested that appellant make another statement embodying the truth, and he refused to do so.

III. THE TRIAL COURT DID NOT LOSE JURISDICTION TO PRONOUNCE JUDGMENT IN THAT THERE WAS NO DENIAL OF A SPEEDY TRIAL IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

The appellant contends as his first specification of error that the trial Court erred in denying appellant's motion in arrest of judgment on the grounds that the Court lost jurisdiction to pronounce judgment therein in that the appellant had been denied a speedy trial in violation of the Sixth Amendment to the Constitution of the United States.

The appellant argues by dint of quotation from the case of *Pinkussohn v. United State*s (C.C. 7th, 1937) 88 F. 2d 70, that the trial Court should have lost jurisdiction to pronounce judgment because of the long delay that elapsed in arriving at a verdict thereby violating appellant's rights under the Sixth Amendment to the Constitution. In the *Pinkussohn* case, which involves almost identical facts as are here present, the Court had no hesitancy in affirming the conviction. Appellant cites three cases:

Ex parte Singer, 284 Fed. 60 (1922);

Ex parte Dellan (C.C.A. 9), 1928, Calif. 26 F. 2d 243;

Pratt v. United States (1939), 102 F. 2d 275.

The three cases cited by the appellant are not in point inasmuch as the delay in these cases was occasioned principally after a conviction or a plea had been obtained and the delay was in the pronouncing of sentence on the defendant.

In addition the cases of *Ex parte Singer* and *Ex parte Dellan, supra,* were decided prior to the case of *Miller v. Aderhold,* 288 U.S. 206, wherein the Supreme Court resolves the conflict in the cases cited by the appellant and states at paragraph 1 on page 210, as follows:

> "The decisions on the point are in conflict. The greater number support the view of petitioner; but we are of opinion that the weight of reason is the other way. Several of the cases holding with petitioner are set forth in Mintie v. Biddle (C.C.A.) 15 F. (2d) 931, 933. While these cases and others are emphatically to the effect that a permanent suspension of sentence is void, and that the court thereby, with the passing of the term, loses jurisdiction, *we find no convincing reason in any of them for the latter conclusions.*" (Italics supplied.)

Rule 32(a) of the Federal Rules of Criminal Procedure provides that sentence shall be imposed without unreasonable delay.

In the instant case, the appellant was found guilty on June 13, 1953, and sentence was imposed on July 13, 1953, which delay in time was not prejudicial to the appellant. *State v. Beckwith* (1944) 57 N.E. 2d 193; *Iva Ikuko Toguri D'Aquino v. United States,* C. A. Cal. 1951, 192 F. 2d 338, rehearing denied 203 F. 2d 390, certiorari denied 72 S.Ct. 772, 343 U.S. 935.

Federal Rule 48(b) of the Federal Rules of Criminal Procedure provides:

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

This rule appears to have been fully complied with inasmuch as the defendant was indicted on November 26, 1951 and brought to trial on May 13, 1952.

This Court has had occasion to consider this problem in several cases, and in the case of *Daniels v. United States,* 17 F. 2d 339 (C.C.A. 9) stated:

> "No statute of the United States defines the time within which criminal accusations must be tried. In the absence of such a statute, it would seem that, if the accused fails in his efforts to bring the case on for trial, his only remedy would be to apply to an appellate court for mandamus. It has been so held. Frankel v. Woodrough (C. C.A.) 7 F. (2d) 796. It is also held that one may not acquiesce in the postponement of his trial from time to time, and then insist on dismissal because he has been denied a speedy trial. Phillips v. United States (C.C.A.) 201 F. 259; Worthington v. United States (C.C.A.) 1 F. (2d) 154, certiorari denied 266 U.S. 626, 45 S.Ct. 125, 69 L.Ed. 475.

The appellant has cited no statute or Federal Rule of Criminal Procedure which defines the time within which a criminal action must be tried. In addition

the record is barren of any demand by the appellant for a speedy trial. Under the circumstances the appellant has given an implied consent to any delay in this case.

Appell v. United States, 274 U.S. 744;

Iva Ikuko Toguri D'Aquino v. United States, (C.A. 9th 1951), 192 F. 2d 338, rehearing denied 203 F. 2d 390, certiorari denied 72 S. Ct. 772, 343 U.S. 935;

Danziger v. United States, (C.C.A. 9) 161 F. 2d 299, 301, certiorari denied 332 U.S. 769;

Daniels v. United States, (C.C.A. 9) 17 F. 2d 339, 344, certiorari denied;

Rosenwinkel v. Hall (C.C.A. 7 1932) 61 F. 2d 724;

Worthington v. United States, 1 F. 2d 154.

CONCLUSION.

For the reasons heretofore stated, it is respectfully submitted that the judgment and sentence of the District Court should be affirmed.

Dated, San Francisco, California,
February 23, 1954.

Respectfully submitted,

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Attorneys for Appellee.

(Appendix "A" Follows.)

Appendix "A"

Appendix "A"

LIST OF TRIAL COURT'S EXHIBITS.

Government's Exhibits.

Exhibit No.

1. The joint income tax return of Michael and Esther Campodonico for the year 1945.
2. The joint income tax return of Michael and Esther Campodonico for the year 1946.
3. The income tax return of Michael Campodonico for the year 1947.
4. The income tax return of Esther Campodonico for the year 1947.
5. The joint income tax return of Michael and Esther Campodonico for the year 1948.
6. The joint income tax return of Michael and Esther Campodonico for the year 1949.
7. Transcript of testimony of Michael A. Campodonico taken at a conference on May 4, 1950, at 608 California Building, Stockton, California.

Defendant's Exhibits.

A. Receipt issued by American Trust Company acknowledging payment of $3,524.69 by Michael A. Campodonico on August 31, 1943.

No. 14,089

IN THE

United States Court of Appeals

For the Ninth Circuit

MICHAEL CAMPODONICO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The appellant, Michael Campodonico, was indicted on November 26, 1951, in the District Court for the Northern District of California, Northern Division, as follows:

COUNT ONE—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1946, by means of the filing

of a fraudulent joint income tax return which understated their income tax in the amount of $11,730.98.

COUNT TWO—for willful and knowing attempt to evade and defeat income tax due and owing by him for the year 1947, by means of the filing of a fraudulent income tax return which understated his income tax in the amount of $2,237.47.

COUNT THREE—for willful and knowing attempt to evade and defeat income tax due and owing by his wife, Esther Campodonico, for the year 1947, by means of the filing of a fraudulent income tax return which understated her income tax in the amount of $2,317.97.

COUNT FOUR—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1948, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $488.52.

COUNT FIVE—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1949, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $4,775.94.

The appellant was arraigned on November 30, 1951, before United States District Judge Dal M. Lemmon, at which time appellant entered a plea of not guilty to each count of the indictment. The case came on for trial on May 13, 1952, before the Honorable Oliver J. Carter, judge. Jury trial was waived by

the appellant. (R. 30.) At the close of the Government's case, on May 14, 1952, the appellant moved for judgment of acquittal (R. 228), and the trial was continued until further order of the Court in order that briefs might be submitted and appellant's motion be given full consideration by the Court. On August 8, 1952, appellant's motion for acquittal was denied (R. 233), and the United States reopened its case in chief for further testimony. (R. 234.) On August 8, 1952, appellant's motion for judgment of acquittal was renewed and denied, the appellant rested, and the case was continued to September 5, 1952, for final argument, on which date the case was submitted.

On June 13, 1953, Judge Oliver J. Carter adjudged the appellant guilty as charged in each count of the indictment. On July 17, 1953, appellant moved for arrest of judgment, which was denied, and a motion for judgment of acquittal was granted as to Counts 4 and 5. Motion for a new trial was also denied on that date. On July 17, 1953, Judge Carter sentenced the appellant to imprisonment for a period of 18 months and a fine of $5,000 on Count 1; to imprisonment for a period of 18 months on Count 2, said terms of imprisonment to run concurrently; and to no imprisonment or fine as to Count 3. Notice of appeal was filed on July 27, 1953, and bail on appeal was set at $6,000.

STATUTE INVOLVED.

Title 26, Int. Rev. Code; Sec. 145(b).

PENALTIES

* * * * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

SUPPLEMENTAL STATEMENT OF THE CASE.

Appellee's statement of the case is largely predicated on Exhibit 7, which is an oral, uncorroborated, extrajudicial statement made by appellant to his attorney and agents of the Government. It is submitted without this statement there is no substantial evidence upon which to sustain this conviction.

It is interesting to note that the opening pages of the appellee's brief abound in references to appellant's reputation and character as far back as the early 1920's (Appellee's Brief, page 4), where he is referred to as a pimp, a bootlegger, and a gambler. Appellant has, however, confidence in the fact that

these references to a former life will not prejudice his case before this Court. Attention of the Court is here invited to the additional facts contained in Exhibit 7 that he was married in 1938; that he adopted a little girl through the Department of Social Welfare of the State of California in 1946; and that there is not on iota of evidence in this record that from 1943 to the present time that appellant was engaged in any occupation except that he was an employee of a gambling establishment. There is no argument with the rule on appeal that the facts of a case must be stated most favorable to the Government, but it is submitted that this rule does not mean that the facts pertinent to the issue may be ignored and isolated unsupported facts may be supplanted for the testimony in the case. For example, the following facts unequivocably appeared from the evidence: That appellant did not gamble at his place of employment, and that Joe Gianelli, a witness for the appellee, testified that he had known appellant for thirty years and that he never knew him as a gambler. (R. T. p. 94.) (See also R. T. p. 96, R. T. p. 87.) Throughout the entire record, all of the witnesses are in accord that appellant never, never won any substantial sum in gambling and that appellant did state to all witnesses that he had large sums of cash prior to December 31, 1945. These are very significant points, in view of the statement made by counsel for the appellee, that he was going to prove at the outset of the trial the great increase in net worth from "Large Gambling Winnings".

Again, where in this record is there any evidence of gambling winnings? It was established beyond any peradventure of a doubt from the Government's own witnesses that appellant had large sums of cash on hand prior to December 31, 1945, and that he made no substantial sums of money gambling during the years in question.

QUESTIONS PRESENTED IN THIS CASE.

The questions presented in this case for decision on appeal are set forth in both appellant's and appellee's Opening Briefs, and will not be repeated herein.

ARGUMENT.

Appellant has no argument with the general principles of law regarding such elementary matters as the rights and duties of an Appellate Court or with such fundamental rules of law that proof of the corpus delicti must be established before the extrajudicial statement of the defendant is admissible, etc.

In a net worth case, based on the expenditure method of proof, a solid beginning net worth and a probable source of income must first be established.

The argument in this case is simply that the Government utterly failed to prove two essential elements in a net worth (tax evasion) case, namely, a reasonable beginning net worth and source of income. The Government, by the argument in its brief, takes

comfort from Exhibit 7 to establish source of income. The Court's attention is invited to other portions of Exhibit 7, which are studiously avoided by the appellee, namely, the amount of cash on hand at the end of 1945. It is submitted that this statement was inadmissible upon the same legal grounds as it was in *Calderon v. United States,* 207 F. 2d 377 (C.A. 9th 1953), namely, that the corpus delicti had not been established. Assuming its admissibility to have been proper, can it be said that in the face of constant and repeated assertions by the appellant that he had large sums of cash on hand on December 31, 1945, be entirely ignored?

The testimony of the revenue agents is that as a result of their investigation, they found no evidence of cash on hand. Their investigation consisted only of searching all banks and public records. In the face of leads that appellant gave these agents, was there not a great dereliction of duty in failing to make some inquiry regarding cash on hand?

Attention of the Court is here invited to the cursory investigation which must have been made by the revenue agents when they failed to even inquire if appellant had a safety deposit box in prior years. Mr. Taynton testified that in computing the beginning net worth, he did not know that appellant continuously had a safety deposit box in the Bank of America since 1936 and that on January 2, 1943, appellant had not one, but two safety deposit boxes, and that one of these was a large one. (R. T. pp. 179, 180, 181, 182.)

See R. T. pp. 299, 300 for a stipulation between counsel that appellant had safety deposit boxes, entirely overlooked by the Government. In the face of this evidence, together with appellant's constant reiteration of cash on hand, can it be said that the beginning net worth is accurate or reliable? Moreover, as though this were not self-evident, reference is hereby made to the insert which is reflected opposite Page 5 of Appellee's Brief. Note no cash at all is taken into account on December 31, 1945. Yet in the 5th month of 1946, appellant pays cash for a house in the sum of $22,500.00. Can it be contended with any reasonableness that this cash was acquired by appellant in his gambling activities which are entirely negatived by the evidence, inasmuch as all witnesses testified appellant made no money gambling. Considering this purchase made, nevertheless, in the fifth month of 1946, it is apparent that in view of the statement of appellant that he had over $50,000.00 in cash in 1943 (Ex. 7), and in view of the overlooked safety deposit boxes, that appellant had some cash on hand which was not taken into account in computing the net worth beginning. Accordingly, as was held in the *Calderon* case,

> "Absent such a starting item as, say, cash on hand the remainder of the statement proves nothing."

Obviously, counsel who prepared the brief for the appellee was oblivious of this holding in the *Calderon* case, for in the appellee's brief, p. 26, appears this statement:

> "Of all the items comprising the net worth, appellant's brief only questions the lack of a cash on hand item as of December 31, 1945."

A bold assertion that the examining officers found no other assets does not indicate that the examining officers' search was exceptionally thorough.

The trial Court's remarks (cited in appellant's Opening Brief, pp. 39-40) concerning cash on hand may be considered by this Court as a significant expression of the failure of proof on the part of the government.

I. NO SOURCE OF INCOME WAS ESTABLISHED.

There is absolutely not one scintilla of evidence that appellant made any substantial sum in gambling in the years involved or in any year except by the extrajudicial statement of appellant which he refused to sign as untrue. All of the Government's witnesses testified contrary to the factual statement of appellee on the question as to whether appellant had made any money gambling.

On page 39 of Appellee's Brief, counsel for the Government asserts that there are "several possible sources of unreported income". Appellee contends that appellant was well known as a gambler during the years involved. Consider this bald statement in the light of the testimony of *all* the Government witnesses that he was not a gambler. Again, does the mere employment in a gambling house upon a set

salary constitute a source of income in the light of the testimony of Joe Gianelli, a prosecution witness, who testified that appellant never gambled in the gambling house, nor at any other place at any other time, and that appellant was not known as a gambler. (R. Tr. pp. 96, 97.) Again, how can the Government contend in its argument on this point that although the "receipts of the club were normal during the times that Campodonico assumed the managerial duties", (Appellee's Brief, Paragraph 5, p. 15) and in another portion of the brief, make the argument that as a possible source of income appellant "had access to large sums of money". This position is so untenable that it makes the argument sound ridiculous.

II. THE EVIDENCE DOES NOT SUPPORT THE CONVICTION OF APPELLANT ON COUNTS 1, 2 AND 3.

It is strange that appellant should have been acquitted of Counts 4 and 5 by the trial Court and convicted on Counts 1, 2 and 3. Precisely the same evidence was offered as to Counts 4 and 5 as was offered and received as to Counts 1, 2 and 3. The Court's attention is again invited to examine the Government's insert opposite page 5, and it will readily appear obvious that the increase in net worth in 1948 and 1949 was greater than the increase in 1946 and 1947 and by precisely the same expenditure method. Does it not appear inconsistent that an acquittal of the latter should have been granted if in

fact there was sufficient evidence to convict in 1946-1947. What additional evidence is there for the earlier years? None!

III. AUTHORITIES CITED BY APPELLEE DO NOT SUPPORT ITS CONTENTION AS TO THE CASE AT BAR.

It is submitted that appellee has sought to stretch the pertinence of the rules of law applicable to this case so as to effect a result not supported by authorities it has cited.

The following cases have been cited and referred to in the case at bar, and the rules thereof are well known to this Court:

Calderon v. United States, 207 Fed. 2d 263 (Cir. 9);

Bryan v. United States, 175 Fed. 2d 223 (Cir. 5);

United States v. Fenwick, 177 Fed. 2d 488 (Cir. 7);

Gariepy v. United States, 189 Fed. 2d 459 (Cir. 6);

Brodella v. United States, 184 Fed. 2d 823 (Cir. 6);

Pong Wing Quong v. United States, 111 Fed. 2d 751 (Cir. 9);

Gulotta v. United States, 113 Fed. 2d 683 (Cir. 8);

Yost v. United States, 157 Fed. 2d 147 (Cir. 4);

Spriggs v. United States, 198 Fed. 2d 782 (Cir. 9);
United States v. Chapman, 168 Fed. 2d 997 (Cir. 7);
United States v. Hornstein, 176 Fed. 2d 488;
Jelaza v. United States, 179 Fed. 2d 202;
Bell v. United States, 169 Fed. 2d 929;
Gleckman v. United States, 80 Fed. 2d 394;
Schuermann v. United States, 174 Fed. 2d 397.

Appellant merely desires to call the Court's attention to the doctrine of these cases in the light of the evidence in the case at bar, and to briefly discuss the ones most applicable to the issues of this case.

It is not for appellant to criticize the ruling of the *Bryan* and *Fenwick* cases, especially in view of the recent *Calderon* case, decided by this Court, in which these two cases are cited with approval.

Let us consider some of the cases cited by appellee insofar as they pertain to the facts of this case:

In *Schuermann v. United States,* 174 F. 2d 397, cert. den. 338 U. S. 831, these facts appeared:

1. The defendant was engaged in a numbers racket which was proven to be a gambling business.

2. The defendant rented a safety deposit box under an assumed name, which he frequently visited. (Concealment.)

3. The defendant purchased property in other people's names. (Concealment.)

4. The defendant admitted to the Revenue Agent that at the beginning net worth period, he had no large sums of currency on hand, thusly establishing a solid beginning net worth.

It is submitted, therefore, that the essential elements of a net worth case were established, namely:

1. Defendant was engaged in a lucrative business;

2. There was concealment of his assets; and

3. A solid beginning net worth was established.

In *Barcott v. United States,* 169 F. 2d 929, 336 U.S. 912, the Government proved that during the years in question, the defendant operated a large restaurant business in Tacoma, Washington; that he was in financial straits at the beginning net worth year, and that he offered bribes to Revenue Agents investigating the case, showing consciousness of guilt.

In *Gariepy v. United States,* 189 F. 2d 459, it was stipulated or uncontroverted that at the beginning net worth year selected by the Government, the defendant was in debt in the sum of $4,858.64, and that he was a doctor by profession, and thusly engaged in a lucrative calling.

In *Jelaza v. United States,* 179 F. 2d 202, the evidence disclosed that the defendant was engaged in a lucrative business, and the Government's proof rested

on the profits derived from his business, and that there was evidence other than the extrajudicial statement of the defendant as to his beginning net worth.

In *United States v. Hornstein,* 176 F. 2d 217, the evidence disclosed that the defendant was engaged in the business of buying and selling diamonds and jewelry. Moreover, the deficiency was based upon proven suppressed sales.

The foregoing are the leading cases relied upon by the Government's counsel, to substantiate his announced position to the trial Court, to-wit: That he would submit to the trial Court authority to the effect that it was unnecessary to establish a probable source of income in a net worth case. (R. T. 225.) All of the case cited have been considered, and it is submitted that in each of these cases a probable source of income has been established, and commented upon by the Courts.

It is significant that Counsel for the Government has failed to name one case dispensing with the requirement of a probable source of income, and has chosen instead to rely upon isolated statements in the above authorities cited, in which a possible source of income was established.

It is evident that counsel for the Government in the trial Court was relying on the existence of such authority, and that this was the theory of the Government's case against the appellant, which now clearly appears to be in error, and hence has sought

to rely on evidence which is not in the record. It is submitted that had the Government known that the law requires the Government to establish a possible source of income, this prosecution would never have been undertaken.

It appears from the brief of the Government in this case that there is no substantial disagreement as to the requirement in a net worth case that: (1) A satisfactory beginning net worth must be established; and (2) that a lucrative business or calling must also be proven, to establish a probable source of taxable income.

The Government appears to have based its case solely upon the theory that proof of acquisition of money or property is sufficient in and of itself to establish a net worth case, and conversely, that nothing further is required to establish the essential elements of a net worth case, to-wit: A solid beginning net worth, and a lucrative business or calling, tending to prove a source of taxable income. In effect, the Government contends that inferences may be drawn from the limited evidence presented, to establish the two essential elements mentioned.

The sole issue then to be determined by the Court is, whether or not, the circumstantial evidence offered by the Government is sufficient to establish taxable income?

As a matter of fact, the mere acquisition of money or property is not proof of income. It is merely a

fact from which, under certain circumstances, an inference may be drawn to show income. To infer from this inference that the appellant had no prior accumulated assets or money, is certainly drawing an inference from an inference—which is not legally permissible.

This rule is clearly set forth in *United States v. Cole,* 90 Fed. Supp 147, at page 156, as follows:

> "That no inference of fact or of law is reliably drawn from premises which are uncertain."

It is submitted that the uncertainty in the case at bar lies in the fact that contained in Exhibit 7 (Appellant's Statement) are admissions as to the appellant's occupation and source of income. Attention is here invited to the testimony offered by the Government that the appellant refused to sign the Statement because it was untrue, and by *all* Government witnesses on this point, it was further established beyond any peradventure of a doubt, and contrary to the inference, that the appellant did not receive any gambling winnings, nor that the appellant derived taxable income from any source whatsoever.

Reference is again hereby made to the opening statement of counsel for the Government, that the principal source of income was from gambling winnings.

It is significant to note, that although this point was clearly set forth in appellant's Opening Brief, the Government, in its Reply Brief, simply makes a

bald statement, unsupported by the evidence, that the appellant was well known as a gambler during the years involved, without one scintilla of evidence that he won any money gambling in the years in question.

In the case at bar, the proof of the source of income is relied upon by the Government merely because there was some evidence that the appellant's general reputation was that of a gambler. Further, it may be asserted that the Government knew prior to this prosecution, that the appellant's source of income was not gambling. (Referring to the testimony of Mandalari, Gianelli, McNabb, Seaman, and Revenue Agent Taynton, and Exhibit 7.)

The case of *Kirsch v. U.S.,* (CCA 8, 1949), 174 F. 2d 595, 37 AFTR 1492, directly involves this point. The facts of the above quoted case are as follows:

Defendant owned a tavern, in Waterloo, Iowa, and also made "Commissions" from illicit liquor sales. A large number of pay checks of employees of local industries were cashed at the tavern. Two bank employees, called by the Government, testified that these pay checks were either cashed at the bank or deposited to the tavern account. The deposits of the pay checks were frequent, and in comparatively large amounts. The business receipts of the tavern were also deposited in the same account, at the bank. The total amount of all of the deposits of the tavern was approximately $90,000.00 during the year 1944. While the exact method of computation is not stated in the

record, it appears that $35,431.00 represented the receipts from the tavern, and was treated as *identified* income, and the balance of $54,880.00 was treated as income but *unidentified.*

At the trial, a Government witness stated that he "endeavored to identify the deposits", but being unable to do so, "we have included them as income because they have not been identified". He further stated, "These unidentified deposits represent income to me for the purpose of conducting an audit of income." He stated that he had been told that a "lot of labor checks" had been cashed at the tavern, but that he made no investigation to find out whether or not that was true. He said: "We had no way of determining whether or not part of the deposits were income and the rest was for money cashing checks, and have charged up the entire bank account as income."

The Circuit Court stated,

> "It is readily obvious from the foregoing facts that the Government was fully cognizant of the fact prior to the trial, that a large part of the deposits made to the credit of the tavern account did not represent income."

In the trial Court there was a discussion involving the hypothetical question as to the amount of taxes due, in which question it was assumed that the unidentified deposits were income. The Court admonished the jury that that was a question for it, the jury, to decide.

In reversing the Judgment, the Circuit Court stated, that none of the foregoing considerations will justify the unqualified assumption of a fact as true that is known to be false. The hypothetical question assumed without qualification that all of the deposits in the tavern account and in defendant's personal account constituted income for tax computation purposes. That assumption of fact was not only without evidentiary support even from permissible inference from proven facts, but was definitely disproved by the Government's own evidence. It is one thing for a party to say, in effect, as was done in the *Gleckman* case, that he had exercised all of the means he reasonably could to determine how much of a bank account was income, had eliminated all he could determine was not income, and was therefore assuming, for the purpose of calculating taxes due, that the remainder was income, and quite another and different thing to say, in effect, as was done in this case—My evidence shows that all of these deposits were not income, but I do not know how much was not, I have made no effort to find out. So I am assuming that all are income and am casting the burden on the defendant to show, if he can, how much is not, or suffer the consequences. The latter proceeding cannot be approved. It should never be necessary for the Government to negative a defendant's defense in a hypothetical question such as this. But it always should be necessary that the facts and circumstances put in evidence by the Government, justify, by reasonable inference, at least, the truth of the assumed fact.

> "What constitutes a reasonable effort to establish the truth of the fact assumed, and what facts or circumstances will constitute a proper foundation for the assumption, and permit a reasonable presumption of the truth of the fact assumed in a hypothetical question, may not be narrowly circumscribed, but must be left to a considerable extent to the discretion of the trial court. But in this instance, there was no foundation for the assumption that all of the deposits constituted income."

From the foregoing decision, it appears that a trial judge is authorized and directed to consider the quantum of proof and draw reasonable inferences as to the weight to be given to certain circumstances. For instance, a bank account may or may not constitute satisfactory evidence of income. Ordinarily, it is left to a jury to determine the facts and draw inference as to the effect of having a bank account. In this case (*Kirsch*) there is no question but that the defendant had a bank account, but in view of the evidence, and the reasonable inferences to be drawn therefrom, the Appellate Court reversed, because the trial Court did not weigh the evidence and draw inferences in regard to the unidentified bank deposits. Specifically, there was sufficient evidence in the record from which an inference should have been drawn by the trial Court, that the unidentified deposits did not constitute income.

The two bank employees, testifying for the Government, stated that the defendant handled a large

number of payroll checks. Some of these were deposited to the tavern account, and the remainder cashed—evidently for the purpose of cashing other payroll checks. A deputy collector stated that he had been told that "a lot of labor checks" had been cashed at the tavern. The inference or conclusion to be drawn from this evidence is that the source of part of the deposits was the cash used to cash payroll checks—certainly not a taxable transaction. The Circuit Court held that the trial Court should have drawn this inference, and should not have permitted a hypothetical question from which a contrary conclusion might have been drawn by the jury, regardless of the admonition given to the jury as to their right to determine facts.

Similar questions are presented in the case at bar, in connection with the evidence relied upon by the Government to establish a beginning net worth, and a source of income. The Revenue Agent testified that he merely assumed that the appellant had no cash at the beginning of 1946, or December 31, 1945. This in spite of the fact that the record shows substantial expenditures of cash both before and after the beginning net worth period. The only condition under which this assumption might be justified would be to show a source of income during the years involved, from which the expended cash was derived. In this case, according to the evidence and the opening statement of counsel for the Government, the only source of income was that of gambling winnings. Not only is there a total lack of substantial evidence of gam-

bling winnings, but there is positive evidence, from the testimony of the Government's witnesses, that the appellant did not gamble and did not receive gambling winnings.

In the *Kirsch* case (supra) it is stated:

> "But it should always be necessary that the facts and circumstances put in evidence by the Government justify, by reasonable inference at least, the truth of the assumed fact."

The Circuit Court, evidently, was not satisfied with the presentation of the case by the Government, in that the investigating agent neglected to follow up known sources of information, which were essential for the adjudication of the case. The Court refused to go along with the arbitrary assumptions of the Government, and pointed out the facts and inferences from which a contrary conclusion should have been reached by the trial Court.

IV. APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE LONG DELAY FROM THE SUBMISSION OF THE CASE TO THE RENDITION OF JUDGMENT.

Counsel for appellee in his reply brief (p. 49) states that appellant has cited no statute which defines the time within which a criminal action must be tried. The answer is that the United States Constitution is sufficient authority on this point. The argument of appellant, however, is not that the time consumed in his trial was too lengthy, but rather the time elapsing from submission of the case to decision, which was from May to the following June.

It appears to appellant that the Sixth Amendment to the United States Constitution is sufficient authority to preclude appellant's constitutional rights from being thus violated.

It is submitted that this vital issue should now be clarified by this Court. If this point is not now decided, may not a Court take a case under submission for years, thereby leaving a person dangling in mid-air as to his future?

In the case at bar, the appellant had nothing to do with the delay. It certainly would have been an inappropriate act for the appellant to have brought mandamus to compel a Court to render its decision, especially so, since nearly all of the remarks of the Court in reference to the sufficiency of the evidence were favorable to appellant.

CONCLUSION.

It is respectfully submitted that for the foregoing reasons, the judgment and sentence of the District Court should be reversed.

Dated, Stockton, California,
April 2, 1954.

Respectfully submitted,
EMMET J. SEAWELL,
WILLENS & BOSCOE,
By DONALD D. BOSCOE,
Attorneys for Appellant.

No. 14,089

IN THE

United States Court of Appeals

For the Ninth Circuit

MICHAEL CAMPODONICO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING

(Or, If Such Rehearing Be Denied, for a Stay of Mandate).

WILLENS AND BOSCOE,
By DONALD D. BOSCOE,
1016 Bank of America Building, Stockton, California.
Attorneys for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,089

IN THE

United States Court of Appeals

For the Ninth Circuit

MICHAEL CAMPODONICO,
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vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING

(Or, If Such Rehearing Be Denied, for a Stay of Mandate).

TO: The Honorable Dal M. Lemmon and Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Michael Campodonico, appellant above named, hereby petitions for a rehearing of the above cause decided April 27, 1955, for the following reasons:

(1) The Court failed to consider and pass upon material issues of law and fact.

(2) The Court failed to consider and take into account controlling precedents.

(3) The Court misconstrued controlling precedents.

(4) The Supreme Court of the United States has rendered decisions contrary to the decision of this Court.

OPENING STATEMENT.

This petition involves the interpretation of four cases decided by the Supreme Court of the United States on December 6, 1954, in relation to the use of the net worth method in computing income tax liabilities insofar as these decisions affect the decision of this Court, dated April 27, 1955, affirming the judgment and sentence of the United States District Court in the case therein mentioned. The four Supreme Court cases are:

United States v. Calderon, 75 S.Ct. 186, 348 U.S. 160;

Friedberg v. United States, 75 S.Ct. 138, 348 U.S. 142;

Holland v. United States, 75 S.Ct. 127, 348 U.S. 121;

Smith v. United States, 75 S.Ct. 194, 348 U.S. 147.

In view of the notoriety of these cases, and for brevity, these cases will hereinafter be referred to as the *Four Cases.* The questions presented and argument consist of the contentions that: (1) A satisfactory and correct beginning net worth has not been established; (2) The Government failed to consider the leads furnished; (3) A current lucrative source of income was not established; and (4) The delay in

rendering a decision deprived defendant of his constitutional rights.

BEGINNING NET WORTH.

The decision of this Court in passing upon the sufficiency of the evidence to establish a beginning net worth is brief, and as follows:

> Page 6. "We have carefully examined the record relating to appellant's assets and expenditures for the years in question, summarized above, and we find that the appellee's evidence relating to the beginning net worth and the increase in net worth supported the judgment of the trial court."

The evidence discussed, as being sufficient to support the beginning net worth, appears on page 3 of the decision: First, in the next to the last paragraph, as follows:

> "* * * The Revenue Agent then attempted to assemble information with respect to the appellant's net worth. He found no evidence of any cash on hand at the end of 1945, * * *"

- - and Second, in the last paragraph on page 3, as follows:

> "Taynton examined the public records, inquired at all local banks, and made an audit of the Capitola Liquor Store, in which the appellant had a one-half interest."

This Court determined this evidence to be sufficient to establish a beginning amount of cash on hand. The controlling issue in this case is the amount of the

beginning cash on hand, and unless otherwise specifically mentioned, the statements herein contained revolve about the said beginning cash on hand. As justification for such determination, this Court cited and paraphrased a statement appearing in *United States v. Calderon,* 348 U.S. at page 165, which statement is:

> "We must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method."

The decision of this Court has promulgated an interpretation of this statement to mean that the "present-worth method" supplants the commonly known, and otherwise commonly designated, net worth method in computing a tax liability. The decision goes even further by way of its citation,

> "Evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income. It is then incumbent on the defendant to overcome the logical inferences to be drawn from the facts proved. *United States v. Hornstein,* 7 Cir. 1949, 176 F 2d 217, 220."

The decision does not comment upon the nature or meaning of the term "independent evidence" except as it is paraphrased by the use of the term, "present worth". Neither is there any discussion or criticism of the meaning of this term as set forth in appellant's Supplemental Brief. There is little doubt, however, but that the term, "independent evidence", as discussed by the Supreme Court in the *Four Cases,* and the paraphrase, "present-worth", as used in the deci-

sion of this Court, refers to the taxpayer's financial circumstances and acquisition of visible assets, during the prosecution years, and his coincidental failure to report income in a corresponding amount.

According to the decision of this Court, the establishment of the "present-worth" is all that is required in a prosecution for income tax evasion; and when this "present-worth" is once established, it is then incumbent upon the defendant to overcome the logical inferences of income tax evasion, solely on account of the "present-worth" of the defendant. The logical conclusion in line with this decision is, that it is not necessary to resort to the net worth method. In fact, this Court by its decision on page 7, substituted the term, "present-worth method", in place of and when it should have used the term, "net worth method". Another conclusion to be drawn from the use of the paraphrase, "present-worth method", is that, with the elimination of the net worth method, the establishment of a beginning net worth is not necessary. And still another conclusion to be drawn is, that the financial condition of the taxpayer, prior to prosecution years, is of no consequence in establishing a prima facie case, and that it is incumbent upon a defendant to go forward with such proof, if he so desires. All of this is based upon the interpretation by this Court of the *Four Cases* decided by the Supreme Court.

The terms used in this Court's decision are ample to refute the above conclusions. Part 3 of the decision is entitled, "3. The Appellee Presented Substantial

Evidence of a Beginning Net Worth for the Appellant, * * *."

The first two sentences of Part 3 are:

> "As we have seen the appellant kept no books. In such a situation the appellee had a right to resort to the net worth increase-expenditure method of arriving at the appellant's income tax liability."

The conclusion of this Court on page 6 is:

> "We have carefully examined the record relating to appellant's assets and expenditures for the years in question, summarized above, and we find that the appellee's evidence relating to the beginning net worth and the increase in net worth supported by the judgment of the trial court."

Thus, this Court has alternately rejected the necessity for the use of the commonly known net worth method, by substituting in its place the present-worth method, and, in the same decision, has justified and relied upon the use of the net worth method. What is this so-called present-worth method as originated in this Court's decision, or its counterpart, the independent evidence as conceived by the Supreme Court?

The Supreme Court has described this question as being "crucial". This question is so crucial in fact that the Supreme Court has granted certiorari in an unprecedented number of cases to provide for a discussion of this question by the various Circuit Courts of Appeal. *Per Curiam Decisions* handed down by the Supreme Court, January 10, 1955, 348 U.S. 904.

Certainly, this independent evidence, standing alone, may not be used to establish the elements of the crime, nor a beginning net worth, nor a likely source of current income. This is in line with the citation from the *Holland* case appearing on page 7 of the decision of this Court,

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source from which the jury could reasonably find that the net worth increases sprang, is sufficient."

It should be noted that the controversial statement of the Supreme Court that, "Accordingly, we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method", does not state that the independent evidence is proof of the crime, but only that it might tend to establish the crime. And, throughout the *Four Cases,* the Supreme Court explicitly explains the purposes for which the independent evidence may be used. This is for corroboration purposes only. This is succinctly stated by the Supreme Court in the *Holland* case, as follows:

> "The problem of corroboration, dealt with in the companion cases of *Smith v. United States* and *United States v. Calderon,* therefore becomes crucial."

The proof of the amount of the beginning cash on hand was an essential issue in the *Four Cases,* as well as in the instant Campodonico case. And the discussion of the use of "independent evidence" appears only

in the two cases of *Calderon* and *Smith,* wherein the admissions of the taxpayers as to a small amount of beginning cash on hand was involved. The Supreme Court held that the independent evidence corroborated the admissions—and nothing further.

There is a broad distinction between the functions of a beginning net worth and the elements of the crime. The beginning net worth is used exclusively to compute any deficiency upon which the prosecution is based. Certainly it cannot be said that if a taxpayer has a small beginning net worth, he is guilty of tax evasion by reason of this circumstance alone, and, conversely, this is equally true under circumstances when a taxpayer has a large beginning net worth. The beginning net worth is used only for the computation of a deficiency. And before any amount may be used as a beginning net worth, it must be proved by the prosecution in accordance with the rules of criminal evidence, without relaxation in the quality, competency, relevancy, or materiality of the evidence used to satisfactorily establish the beginning net worth.

The common method of proving a beginning net worth in tax evasion cases is by means of admissions by the taxpayer. And it is firmly established that the criminal evidence rules requiring corroborations of admissions are applicable to net worth cases, and specifically to the proof of a beginning net worth. The corroboration of admissions as to a small beginning cash on hand was the principal and controlling issue in the *Calderon* case, and the Court of Appeals for the Ninth Circuit held that the evidence relied upon

to corroborate the admission was insufficient because it consisted of hearsay evidence and thereby incompetent; and because of such incompetency, there was in fact no evidence to corroborate the admission. The Supreme Court approved this decision in this respect.

The Supreme Court proceeded from this point, however, to look for other evidence which might be used to corroborate the admission, and arrived at the solution of using the financial circumstances and acquisition of visible assets, during the prosecution years, and the coincidental failure to report for tax purposes a corresponding amount, to tend to support the receipt of unreported income during the prosecution years, by reason of the fact that taxpayer made an admission that he did not have such funds in prior years. These circumstances, the Supreme Court held were sufficient to corroborate the admissions of taxpayer—and nothing further.

It is pertinent to note that the issue of using the independent evidence of financial circumstances during the prosecution years to corroborate the admissions of taxpayer as to a small beginning cash on hand, was not presented to the Ninth Circuit Court of Appeals for determination, or at least this phase of the case was not discussed in its decision, and consequently no ruling was made on this question. The Supreme Court, impliedly at least, approved each and every determination made by the Court of Appeals for the Ninth Circuit in the *Calderon* case. The reversal was made solely upon grounds which the Circuit Court was not called upon to decide. While the

Supreme Court decision was made upon the general question decided by the Circuit Court, to-wit: corroboration of admissions, it cannot be correctly stated that the specific rulings of the Circuit Court were reversed. To the contrary, its determinations were approved. Any other interpretation of the decision of the Supreme Court is erroneous.

The decision of this Court in the instant Campodonico case, on page 8, in interpreting the decision of the Supreme Court in the *Calderon* case, appears to be that the "independent evidence", therein referred to, will tend to establish the crime directly, without resort to the net worth method. By implication, it follows that the decision is that the "independent evidence" is not confined in its use to establish a beginning net worth, but may be used to establish the elements of the crime directly, whether or not used in connection with a net worth computation.

A cursory reading of the said controversial statement might result in such an interpretation, but, in view of the numerous and direct statements to the contrary in the *Four Cases,* such an interpretation should not be established as authority in this jurisdiction.

It should be remembered that in this instant Campodonico case, the beginning cash on hand is one of the essential and material issues, just as it was in the *Four Cases.* The necessity for a satisfactory beginning net worth has long been established as a primary requisite for a net worth computation. Insofar as

known, this precept has never been denied and the decisions of the *Four Cases* are no exception.

The decision of this Court overlooks and fails to consider the material issues of law and fact in respect to the beginning net worth. Specifically, the decision fails to state whether or not the statement of the revenue agent that, "He found no evidence of any cash on hand at the end of 1945" is sufficient to establish the beginning cash on hand to be zero, regardless of the explanation given and leads furnished. Neither is there any explanation or justification for the use of any other evidence to support the finding of the revenue agent that there was no beginning cash on hand.

A discussion of the lack of probative value of such evidence appears in appellant's opening and supplemental briefs, to which reference is hereby made.

LEADS.

The decision of this Court is void of any comments on leads. This question is the subject of an extended discussion in the *Holland* case. It is an extremely important issue in the instant Campodonico case. It involves the determination of whether there is a total lack of evidence to establish the amount of the beginning cash on hand as used in the Government's net worth computation. And further, it involves the sufficiency of appellant's evidence to establish the amount claimed by him as his beginning cash on hand, which is more than ample to account for the expenditures

and accumulation of property forming the basis for the alleged deficiency. There is no comment in the decision, neither is there any evidence in the record, of any lead investigation. As stated in the *Holland* cases,

> "When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

This Court has recognized the leads given by appellant. On pages 4 and 5 of its decision there is a comparatively lengthy enumeration of the leads, significant excerpts of which are:

> "Taynton asked the appellant 'where he got all the money to buy all the assets when he hadn't reported that much income', and the latter replied that 'he made it gambling'—that 'he was a gambler'.
>
> "4. I believe his final position on that was that the $40,000 had come from other than embezzled funds.
> Q. From what source?
> A. Gambling, from gambling.
> The Court. During what period?
> The Witness. From '43 on."

The trial judge was interested in learning during what period the gambling operations wer carried on. The testimony was, "From '43 on", or during a period prior to the prosecution years. Still, the record is void of any evidence of an investigation as to the source of funds which might have been *acquired prior to the prosecution years* as an explanation for the *expenditures made during the prosecution years.*

While, as stated above, the decision is void of any comment on leads, and that there is no evidence of any lead investigation, it might be surmised that this Court considered it unnecessary to supply such deficiencies. This surmise arises from the citation of and comment upon the cases, *United States v. Hornstein,* 7 Cir., 1949, 176 F 2d 217, 220; and *Gariepy v. United States,* 6 Cir., 1951, 189 F 2d 459, 463, and cases cited. Evidently, these cases were cited as authority for the propositions: that unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income; and that it is then incumbent upon the defendant to overcome this prima facie evidence; and that the Government is not required to prove a negative or to refute all possible speculations as to the source of a defendant's asserted funds.

While these propositions are more or less general, it is surmised that the principles were applied by this Court in passing upon the sufficiency of the Government's evidence for its beginning net worth, and its related duty to investigate leads. This attitude is an example of the liberal interpretation of the requirements of proof in a net worth case, mentioned on pages 31 et seq. of Appellant's Opening Brief, and on page 26 of Appellant's Supplementary Brief.

Opposed to this liberal view, however, are the representative cases of *Bryan v. United States,* 5 Cir., 1949, 175 F 2d 223, and *Fenwick v. United States,* 7 Cir., 1949, 177 F 2d 488, and *United States v. Chapman,* 168 F 2d 997. These cases advocate a strict interpreta-

tion of the requirements of proof in a net worth case, in keeping with the decisions of the *Four Cases*. A discussion of these cases appears on pages 30 et seq. of Appellant's Opening Brief, and on page 26 of Appellant's Supplemental Brief.

While the *Calderon* case did not in express terms discuss or announce a policy of adherence to either a strict or a liberal interpretation, the questions decided definitely fix its attitude as leaning toward the strict view. As examples, the case determined: (1) That a satisfactory beginning net worth must be established; (2) That if an admission of taxpayer is relied upon to establish the beginning net worth, the admission must be properly corroborated; and (3) That hearsay evidence is not competent evidence for such corroboration requirements. Insofar as these questions were decided by the Circuit Court, the Supreme Court agreed and approved. And the *Holland* case definitely establishes the necessity to investigate all reasonable leads.

The supplemental briefs of the parties in this action were submitted to discuss the so-called net worth method of income tax computations used in this case, in light of the *Four Cases* decided by the Supreme Court. The decision of this Court was based upon an isolated statement that, "we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method." If this decision is carried to a logical conclusion, it is that, in a net worth case, it is not necessary to resort to the net worth method. Can it be correctly

stated that the Supreme Court has discarded the long established method of proof in net worth cases? Or, is it not more reasonable and proper to state that the Supreme Court has merely passed upon one or more steps or requirements of the method of proof. In the *Calderon* case the single step or requirement was the corroboration of admissions. Any interpretation of the decision of the Supreme Court to the contrary is erroneous.

LUCRATIVE SOURCE OF CURRENT INCOME.

The decision of this Court adheres to its paraphrased term of "present-worth method", in place of net worth method, in connection with its discussion of currently taxable income. In this connection, however, the present-worth method is not relied upon to eliminate the necessity for such proof. To the contrary, the decision accepts the precepts of the *Holland* case as to this requirement, as quoted:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source from which the jury could reasonably find that the net worth increases sprang, is sufficient."

The decision states that the likely source of net worth increases is winnings from gambling. The only basis commented upon for such finding is, "In the case of an admitted and notorious gambler, the 'likely source' would be winnings from gambling." Thus, the evidence relied upon is restricted to reputation, which is hearsay and incompetent, and entirely

lacking in corroboration. In fact, the evidence of appellant's activities, during the prosecution years, was all to the effect that he did not gamble. And the fair implication of all evidence adduced is that appellant's reputation as a gambler was confined to pre-prosecution years. Of course, this pre-prosecution years gambling was admitted by appellant, and this information was furnished as a lead and explanation to account for the accumulation of his beginning cash on hand. The Ninth Circuit Court of Appeals held in the *Calderon* case that such hearsay evidence is incompetent and irrelevant, and, lacking corroboration, is of no force or effect whatsoever. And in this respect, the Supreme Court approved the decision.

DELAY IN RENDERING DECISION.

A delay of one year and two months in rendering a decision and pronouncing judgment is unduly prolonged. It is upon this abstract principle that exception was taken in this appeal. Although this is contrary to the decisions of the cases cited, no valid reason is available to disturb a precedent established by this Court.

CONCLUSION.

The instant Campodonico case is not simple. The trial judge exhibited much interest and concern in

the evidentiary issues, and invited briefs from the parties on many of the points decided by the Supreme Court. He expressed himself as not being sure of the rules to be applied in view of the diversity of the decisions in the Circuits. Nevertheless, he did grant motions for acquittal on two counts.

The decision rendered by this Court is extremely general and vague, and appears to be based more upon the righteous and religious concepts of an indignant judiciary than upon the fundamental precepts of an orderly administration of justice. The newly coined term, "present-worth method", is particularly vague and misleading. Insofar as the meaning of this term might be gleaned from the decision, it is opposed to the law and facts in this case, and contrary to the decisions of the Supreme Court.

Petitioner respectfully submits that the issues raised in this petition are of importance to both the prosecution and defense of income tax evasion cases, and particularly when a net worth method of computation is involved. The Supreme Court went to extraordinary lengths in commenting upon the issues involved in this case, and has granted certiorari in a large number of cases to permit the Circuit Courts to affirm or change their decisions in light of the *Four Cases*. A general summarization of the *Four Cases* in the form of a single term is not appropriate.

Petitioner respectfully requests that this petition for a rehearing be granted, and that upon a rehearing the judgment and sentence of the District Court

be reversed; or, if such rehearing be denied, a stay of mandate be issued pending an appeal to the Supreme Court.

Dated, Stockton, California,
May 23, 1955.

Respectfully submitted,
WILLENS AND BOSCOE,
By DONALD D. BOSCOE,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Stockton, California,
May 23, 1955.

Donald D. Boscoe,
Of Counsel for Appellant and Petitioner.

No. 14090

United States
Court of Appeals
for the Ninth Circuit

HELGA CARLEN, JOHN T. CARLEN, CATHRYN McKAY, ARTHUR R. McKAY, ARTHUR R. and CATHRYN McKAY and JOHN T. and HELGA CARLEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

No. 14090

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Petitioners:
CHARLES F. OSBORN, Esq.
GEORGE F. KACHLEIN, Esq.,

For Respondent:
JOHN J. WELCH, Esq.

DOCKET ENTRIES

1952

June 17—Petition received and filed. Taxpayer notified. Fee paid.

June 20—Copy of petition served on General Counsel.

June 17—Request for Circuit hearing in Seattle, Washington, filed by taxpayer. 6/26/52—Granted.

Aug. 5—Answer filed by General Counsel.

Aug. 5—Request for Hearing in Seattle, Wash., filed by General Counsel.

Aug. 14—Copy of answer and request served on taxpayer, Seattle, Wash.

Oct. 8—Hearing had before Judge Tietjens on merits. Petitioner's motion to consolidate 37662 thru 37665 and add 42122 and 42123, concurred in by respondent, granted. Consolidated, and dockets 42122 and 42123 added and assigned to Seattle calender of October 6, 1952. Stipulation of Facts with Exhibits 1 thru 10 and A thru N, filed. Briefs Dec. 8, 1952; Replies Jan. 7, 1953.

1952

Oct. 22—Transcript of Hearing 10/8/52 filed.

Dec. 8—Brief filed by taxpayer. Copy served 2/3/53.

Dec. 8—Motion for extension to 12/29/52 to file brief, filed by General Counsel. 12/9/52—Granted.

Dec. 29—Motion for extension to 1/31/53 to file brief, filed by General Counsel. 12/31/52—Granted.

1953

Feb. 2—Brief filed by General Counsel.

Mar. 2—Reply Brief filed by General Counsel.

Mar. 4—Reply Brief filed by taxpayer. Copy served 3/5/53.

May 29—Findings of Fact and Opinion rendered. Judge Tietjens. Decision will be entered under Rule 50. 6/2/53—Served.

June 23—Agreement by parties for entry of decision filed.

June 25—Decision entered. Judge Tietjens. Div. 1.

Sept. 17—Petition for review by U. S. Court of Appeals for the Ninth Circuit with assignments of error and acknowledgment of service thereon filed by taxpayer.

Sept. 17—Proof of Service filed by taxpayer.

Sept. 17—Designation of contents of record filed by taxpayer with proof of service thereon.

The Tax Court of the United States

Docket No. 42123

JOHN T. CARLEN and HELGA CARLEN, husband and wife, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency in income tax as set forth by the Commissioner of Internal Revenue in his notice of deficiency (Symbols: Seattle Division, Internal Revenue Service, IT:90D:TRB) dated March 21, 1952 and as the basis of this proceeding allege as follows:

1. The petitioners are husband and wife with residence at 504 12th Street, Raymond, Washington. The income tax returns for the calendar years 1948, 1949 and 1950 here involved were filed with the Collector for the District of Tacoma.

2. A notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to petitioners under date of March 21, 1952.

3. The tax controversy is income tax for the calendar years 1948, 1949 and 1950 in the amounts of $3,904.26, $3,093.50 and $1,401.90, respectively.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

That petitioners, as members of the partnership of McKay and Carlen, were not entitled

to report the gain received from the sale of certain timber under the provisions of Section 117(k) of the Internal Revenue Code, but that all of the gain is to be taxed as ordinary income.

5. The facts upon which petitioners rely as the basis of this proceeding are as follows:

(a) Petitioners are members of a partnership, McKay and Carlen; that said partnership during the taxable years in question was engaged in the logging business in a proprietary capacity.

(b) McKay and Carlen entered into a contract with the Neuskah Tbr. Co., Inc., under date of April 21, 1945, to log and to acquire certain species of timber in a certain area and to pay therefor a certain stumpage after which payment all proceeds of sale belonged to McKay and Carlen; that said contract was subsequently orally amended to include hemlock; that after the dissolution of Neuskah Tbr. Co., Inc. the partnership continued the logging operations under oral contract with E. K. Bishop Lumber Company, successor to Neuskah Tbr. Co.

(c) That said contracts were in existence for a period of more than six (6) months prior to the beginning of the taxable years in question.

(d) That the partnership had a full economic interest in and to the timber cut and converted into logs and then sold under the Neuskah and Bishop contracts as the partnership took the full risk of gain or loss on the cutting, and marketing of such timber; that the partnership bore all of the logging

expense without right of reimbursement from the original timber owner.

(e) That the partnership was not logging under a "service contract" but had a contract right to cut and acquire the timber in question.

(f) The taxpayers and the partnership, McKay and Carlen, properly elected in their tax returns to report the gain realized on the timber and logging operation in question, as long-term capital gain in accordance with Section 117(k) of the Internal Revenue Code.

(g) The partnership of McKay and Carlen was engaged in the business of cutting timber on contract for its own profit in the taxable years in question.

Wherefore, petitioners pray that this Court may hear the proceeding and determine:

(a) That the petitioners are not liable for any additional income tax for the taxable years 1948, 1949 and 1950 by reason of the gain realized on the sale of timber.

(b) That the petitioners, as members of the partnership of McKay and Carlen, properly returned their share of the profits realized by the partnership on the cutting and sale of timber as long-term capital gain taxable under Section 117(k) of the Internal Revenue Code.

(c) That the petitioners as members of the partnership of McKay and Carlen were engaged in the acquisition, cutting and sale of timber in the taxable years involved in accordance with contracts in

existence for more than six months prior to the beginning of each taxable year.

(d) That the Court give these petitioners such other and further relief as is just and equitable in the premises.

/s/ CHARLES F. OSBORN,
/s/ GEORGE F. KACHLEIN, JR.,
Counsel for Petitioners

Duly Verified.

EXHIBIT "A"

Form 1230-A (1951) Internal Revenue Service

U. S. Treasury Department
Office of Internal Revenue Agent in Charge
Securities Bldg., Seattle 1, Washington

IT:90D:TRB March 21, 1952

Mr. John T. Carlen and Mrs. Helga Carlen
Husband and Wife
504 12th Street, Raymond, Washington

Dear Mr. and Mrs. Carlen:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1948, 1949 and 1950, discloses a deficiency of $8,399.66, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of TRB:90D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner,
/s/ By S. R. STOCKTON,
Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Agreement
Form 870.
TRB:em

Statement

Income tax liability for the taxable years ended December 31, 1948, 1949, and 1950.

Year	Deficiency
1948	$3,904.26
1949	3,093.50
1950	1,401.90
Total	$8,399.66

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated Ocober 18, 1951 and to your protest dated January 19, 1952.

A copy of this letter and statement has been mailed to your representative, Mr. Robert L. Aiken, 535 Finch Building, Aberdeen, Washington, in accordance with the authority contained in the power of attorney executed by you.

Taxable year ended December 31, 1948

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return, Form 1040	$ 18,430.64
Unallowable deductions and additional income:	
(a) Partnership income	23,227.36
Total	$ 41,658.00
Nontaxable income and additional deductions:	
(b) Capital gains	11,613.68
Net income as adjusted	$ 30,044.32

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that your distributable share of ordinary net income of the partnership, McKay and Carlen, for the

fiscal year ended April 30, 1948 was $32,377.60 whereas you have reported income of $9,150.24 from that source. Net income is therefore increased by $23,227.36, the difference between the above two amounts.

(b) On your return you reported capital gain of $11,645.67 whereas your corrected income from that source has been determined to be $31.99, a difference of $11,613.68. Net income is reduced accordingly.

COMPUTATION OF TAX

Net income as adjusted	$30,044.32	
Less: Exemptions	2,400.00	
Income subject to tentative tax	$27,644.32	
One-half of income subject to tentative tax	$13,822.16	
Tentative tax		$ 4,183.53
Tax reduction:		
17 per cent of $400.00	$ 68.00	
12 per cent of $3,783.53	454.02	522.02
Balance		$ 3,661.51
Tax liability ($3,661.51 x 2)	$ 7,323.02	
Tax liability per return—Account No. 9120185	3,418.76	
Deficiency of income tax		$ 3,904.26

Taxable year ended December 31, 1949

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return, Form 1040	$21,019.06
Unallowable deductions and additional income:	
(a) Partnership income	17,858.76
Total	$38,877.82
Nontaxable income and additional deductions:	
(b) Capital gains	8,929.38
Net income as adjusted	$29,948.44

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that your distributable share of or-

dinary net income of the partnership. McKay and Carlen, for the fiscal year ended April 30, 1949 was $30,868.13 whereas you have reported income of $13,009.37 from that source. Net income is therefore increased by $17,858.76, the difference between the above two amounts.

(b) On your return you reported capital gain of $9,589.38 whereas your corrected income from that source has been determined to be $660.00, a difference of $8,929.38. Net income is reduced accordingly.

COMPUTATION OF TAX

Net income as adjusted	$29,948.44	
Less: Exemptions	2,400.00	
Income subject to tentative tax	$27,548.44	
One-half of income subject to tentative tax	$13,774.22	
Tentative tax		$ 4,162.91
Tax reduction:		
17 per cent of $400.00	$ 68.00	
12 per cent of $3,762.91	451.55	519.55
Balance		$ 3,643.36
Tax liability ($3,643.36 x 2)	$ 7,286.72	
Tax liability as disclosed by return—		
Account No. 3029871	4,193.22	
Deficiency of income tax		$ 3,093.50

Taxable year ended December 31, 1950

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return, Form 1040		$ 5,804.23
Unallowable deductions and additional income:		
(a) Partnership income		13,781.77
Total		$19,586.00
Nontaxable income and additional deductions:		
(b) Capital gain	$ 6,886.72	
(c) Standard deduction	355.08	7,241.80
Net income as adjusted		$12,344.20

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that your distributable share of ordinary net income of the partnership, McKay and Carlen, for the fiscal year ended April 30, 1950 was $14,130.03 whereas you have reported income of $348.26 from that source. Net income is therefore increased by $13,781.77, the difference between the above two amounts.

(b) On your return you reported capital gain of $6,886.72 whereas it has been determined that you had no income from that source. Net income is reduced accordingly.

(c) On your return you claimed a standard deduction of $644.92. It has been determined that a standard deduction of $1,000.00 is allowable. Accordingly, net income is reduced by $355.08, the difference between the above two amounts.

COMPUTATION OF TAX

Net income as adjusted	$12,861.49	
Less: Exemptions	2,400.00	
Income subject to tentative tax	$10,461.49	
One-half of income subject to tentative tax	$ 5,230.75	
Tentative tax		$ 1,160.00
Tax reduction:		
13 per cent of $400.00	$ 52.00	
9 per cent of $760.00	68.40	120.40
Balance		$ 1,039.60
Tax liability ($1,039.60 x 2)	$ 2,079.20	....
Income tax liability as disclosed by return— Account No. 8067165	673.34	....
Deficiency of income tax		$ 1,405.86

[Endorsed]: T.C.U.S. Filed June 17, 1952.

[Title of Tax Court and Cause No. 42123.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that the Commissioner erred in determining the deficiency as set forth in the notice of deficiency from which petitioners' appeal is taken. Specifically denies the Commissioner erred as alleged in paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that McKay and Carlen entered into a contract with the Neuskah Tbr. Co., Inc., under date of April 21, 1945, to log timber in a certain area. Denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) to (g), inclusive. Denies the allegations contained in subparagraphs (c) to (g), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioners' appeal be denied and that the Commissioner's determination of deficiency be approved.

/s/ CHARLES W. DAVIS,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

WILFORD H. PAYNE,
District Counsel,

DOUGLAS L. BARNES,
JOHN H. WELCH,
Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Aug. 5, 1952.

20 T. C. No. 77

The Tax Court of the United States

Docket Nos. 37662, 37663, 37664, 37665, 42122, 42123

HELGA CARLEN, et al., Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated May 29, 1953.

FINDINGS OF FACT AND OPINION

Capital Gains and Losses—Timber Cutting—Section 117 (k) (1), Internal Revenue Code.

A partnership in which the taxpayers had an interest entered into contracts for logging timber on lands owned by others. For this service they were to be paid compensation measured by the difference between market price of the timber cut and specified stumpage plus a "service fee". Held, the taxpayers were not entitled to capital gains treatment on the timber cut under Section 117 (k) (1).

Charles F. Osborn, Esq., for the petitioners.

John H. Welch, Esq., for the respondent.

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* Proceedings of the following petitioners are consolidated herewith: John T. Carlen; Cathryn McKay; Arthur R. McKay; Arthur R. McKay and Cathryn McKay, husband and wife; and John T. Carlen and Helga Carlen, husband and wife.

The Commissioner determined the following deficiencies in income tax:

Year	Taxpayer	Amount
1947	Arthur R. McKay	$ 561.52
1947	Cathryn McKay	561.52
1947	John T. Carlen	548.01
1947	Helga Carlen	548.00
1948	Arthur R. and Cathryn McKay	3,928.78
1948	John T. and Helga Carlen	3,904.26
1949	Arthur R. and Cathryn McKay	3,052.04*
1949	John T. and Helga Carlen	3,093.50
1950	Arthur R. and Cathryn McKay	1,405.86
1950	John T. and Helga Carlen	1,401.90

* The stipulation of facts shows $3,071.61 with no explanation for the difference.

The only issue is whether the Commissioner erred in finding that the taxpayers are not entitled to capital gains treatment of lumber cut under certain contracts as provided for in section 117 (k) (1) of the Internal Revenue Code.

Findings of Fact.

The stipulated facts are so found and the stipulation is included herein by reference.

Arthur R. McKay and Cathryn McKay are residents of Aberdeen, Washington. John T. Carlen and Helga Carlen are residents of Raymond, Washington.

For the calendar year 1947 the McKays and the Carlens, as members of marital communities, each filed a separate income tax return. For the calendar years 1948, 1949, and 1950 joint returns were filed. All returns were filed with the collector of internal revenue, Tacoma, Washington.

As of May 1, 1945, Arthur R. McKay and John T. Carlen formed an oral general partnership to engage in the logging and cutting of timber in Southwest Washington. During all the years in question the partnership was engaged in the trade or business of logging timber and was not engaged in the business of cutting timber for sale on its own account or for use in its business.

On March 15, 1945, Rayonier Incorporated and Neuskah Timber Company entered into a contract by the terms of which Neuskah purchased from Rayonier all of the merchantable cedar and spruce timber and certain hemlock located on tracts described in the contract and owned by Rayonier. Title to the timber and risk of loss by fire or other casualty was to pass to Neuskah on cutting. Rayonier was to designate the hemlock to be cut and all logs were to be branded with a distinctive design approved by Rayonier. Neuskah agreed to sell back to Rayonier and Rayonier agreed to buy all hemlock logs cut under the contract.

On April 23, 1945, Neuskah entered into the following contract with the McKay and Carlen partnership for cutting part of the spruce and cedar included in the Rayonier-Neuskah contract.

This contract, made and entered into by and between the Neuskah Tbr. Co. Inc., a corporation, of Aberdeen, Washington, hereinafter called First Party and Arthur R. McKay and John Carlen, of Aberdeen, Washington, a co-partnership, hereinafter known as McKay & Carlen, and hereinafter called Second Party, Witnesseth:

That First party owns or controls certain timber in Section Thirty (30) and North Half (N½) of Section Twenty-Nine (2*0*), Township Thirteen (13) North, Range Nine (9) West, W.M., Pacific County, Washington.

Second Party agrees to selective log all the merchantable Sitka Spruce and Western Red Cedar on the above described land in accordance with the usual custom. In the conduct of said operation the Second Party agrees to comply with and conform to all the requirements of law now or hereafter during the term of the contract in effect relating to the operation of cutting, logging and removal of timber, or to fire or the prevention of fire and shall hold First Party harmless from any and all damages resulting from the negligence acts of the Second Party or its agents and employees. Upon completion of logging any definite tract Second Party agrees to leave such land, tract or tracts in such condition that certificate of clearance can be obtained from the State departments pertaining to logging and fire.

All logs when cut shall be branded or stamped with a brand or stamp suitable to the First Party, and absolute title and control of all logs, until sold and paid for, shall rest in the First Party.

All Select, Number One (1) and Number Two (2) Sitka Spruce logs are to be delivered to the mill of E. K. Bishop Lumber Company, Aberdeen, Washington. All other Sitka Spruce and all Western Red Cedar logs are to be delivered to any mill

or mills on Willapa Harbor, such mill or mills to be designated by First Party.

Second Party agrees to operate at least Forty Eight (48) hours per week and to do each and everything necessary to log and deliver said logs to the various mills and agrees to construct and maintain all necessary roads, furnish all necessary equipment and supplies, do all falling, bucking, yarding, loading, trucking, booming, rafting, scaling and towing and to pay when due all labor, state and federal taxes of every kind and nature whatsoever, including but not limited to industrial insurance, unemployment compensation, medical aid, and agrees to keep said logs free from any and all claims, liens or liability.

The Parties hereto agree that from the total net cash returns from the sale of all logs shall be deducted stumpage of Seven Dollars Fifty Cents ($7.50) on all Sitka Spruce logs and Four Dollars ($4.00) on all Western Red Cedar logs, plus One Dollars ($1.00) on all logs, per thousand feet board measure, and that after such deductions the balance shall be paid by First Party to Second Party for this service, such payments to be made within ten (10) days after said logs are rafted and scaled, such scaling to be done by any recognized scaling bureau, to be selected by First Party.

Time is of the essence of this contract and Second Party agrees to start operations promptly and continue said logging without interruption, barring such factors as bad weather or strikes which are beyond Second Party's control.

It is expressly understood and agreed that in all its logging operations hereunder the Second Party acts as and is an independent contractor and nothing herein contained shall operate to make the Second Party an agent of the First Party or to be construed as authorizing or empowering the Second Party to obligate or bind the First Party in any manner whatsoever. It is expressly understood and agreed the First Party and Second Party are not partners or principal or agent.

Neuskah was a subsidiary of E. K. Bishop Lumber Company. On January 31, 1946, Neuskah assigned its contract with Rayonier to E. K. Bishop Lumber Company and thereafter McKay and Carlen dealt with the assignee with regard to the contract. The assignment was approved by Rayonier.

On November 1, 1946, August 15, 1948, and October 25, 1948, Rayonier and E. K. Bishop Lumber Company entered into additional contracts similar in material respects to the contract between Neuskah and Rayonier. At the time these additional contracts were entered into E. K. Bishop Lumber Company immediately entered into an agreement with McKay and Carlen for the logging of the areas described in the contracts between Rayonier and Bishop. The agreements with McKay and Carlen were oral and contemplated terms and conditions similar to those stated in the contract of April 23, 1945, between Neuskah and McKay and Carlen. Under the basic contracts between Rayonier and Neuskah and E. K. Bishop, Neuskah and Bishop

retained the spruce for themselves, but resold all the hemlock and cedar to Rayonier at the market price.

McKay and Carlen faithfully performed its contracts and payments have been made in accordance therewith, including the service charge of $1 per thousand board feet to Neuskah (later E. K. Bishop Lumber Company). McKay and Carlen logged the timber at their own expense and charged all of the costs, including road building, to current operating expenses. They received the net cash returns from the sale of the logs, less the stumpage charge agreed upon and a service fee deducted by E. K. Bishop Lumber Company, which conducted all the selling, collected the proceeds, and remitted to McKay and Carlen the net amount.

McKay and Carlen elected to report their gains on the sale of timber under the various contracts under Section 117 (k).

Opinion.

Tietjens, Judge: The issue for decision is whether the taxpayers may properly treat the cutting of timber under the contracts between the partnership and Neuskah and E. K. Bishop Lumber Company "as a sale or exchange of such timber" as provided in section 117 (k) (1).[1] See also section 117 (j) (1).[2]

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[1] (k) Gain or Loss in the Case of Timber or Coal.—

(l) If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during

If so, they were entitled to treat their gains as capital gains.

In summary, the taxpayers' argument is that they are entitled to the benefits of 117 (k) (1) "either

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such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. In case such election has been made, gain or loss to the taxpayer shall be recognized in an amount equal to the difference between the adjusted basis for depletion of such timber in the hands of the taxpayer and the fair market value of such timber. Such fair market value shall be the fair market value as of the first day of the taxable year in which such timber is cut, and shall thereafter be considered as the cost of such cut timber to the taxpayer for all purposes for which such cost is a necessary factor. If a taxpayer makes an election under this paragraph such election shall apply with respect to all timber which is owned by the taxpayer or which the taxpayer has a contract right to cut and shall be binding upon the taxpayer for the taxable year for which the election is made and for all subsequent years, unless the Commissioner, on showing of undue hardship, permits the taxpayer to revoke his election; such revocation, however, shall preclude any further elections under this paragraph except with the consent of the Commissioner.

[2] (j) Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.—

(1) Definition of Property Used in the Trade or Business.—For the purposes of this subsection, the term "property used in the trade or business" * * * includes timber with respect to which subsection (k) (1) or (2) is applicable.

on the basis that [they] purchased the timber and were the owners thereof at all times (subject to the reservation of title for security purposes) or had a contract right to cut such timber and to sell the timber or logs in the normal course of taxpayers' business."

The Commissioner's position is that the contracts involved were essentially to perform services for compensation and that the partnership did not acquire any interest in the standing timber or the logs as cut which would entitle it to capital gains treatment under the subsection in question.

The question is one of first impression and we have no decided cases to serve as guide posts. Cases such as Springfield Plywood Corporation 15 T.C. 697, which was concerned with section 117 (k) (2), where the decisive question was whether there had been a "disposal" of timber by the owner under a contract by which the owner retained an "economic interest" in the timber, are not controlling here. Both parties agree that section 117 (k) (2) has no application to the situation before us.

We look to Regulations 111, section 29.117-8(a), but find little help. The regulations hardly do more than follow the language of the statute.

Some assistance can be found in that part of the report of the Finance Committee of the Senate, Revenue Bill of 1943, 78th Congress, 1st Session, Report No. 627, dealing with section 117 (k) (1). There the following statement appears, at page 25:

Your committee is of the opinion that various timber owners are seriously handicapped under the Federal income and excess profits tax laws. The law discriminates against taxpayers who dispose of timber by cutting it as compared with those who sell timber outright. The income realized from the cutting of timber is now taxed as ordinary income at full income and excess profits tax rates and not at capital gain rates. In short, if the taxpayer cuts his own timber he loses the benefit of the capital gain rate which applies when he sells the same timber outright to another. Similarly, owners who sell their timber on a so-called cutting contract under which the owner retains an economic interest in the property are held to have leased their property and are therefore not accorded under present law capital-gains treatment of any increase in value realized over the depletion basis.

Our attention also has been called to Boeing vs. United States (Ct. Cls. 1951), 98 F. Supp. 581, where the Court of Claims in dealing with section 117 (k) (2) and not with our specific problem said: The legislative history of 117 (k) indicates that Congress' principal purpose was to afford relief to timber owners.

These quotations do not decide the question. Nevertheless, they seem to fortify the Commissioner's position that unless the taxpayers can be considered as owners of the timber or as persons having a contract right to cut the timber for sale or for use in their own trade or business they are not entitled to claim the benefits of the section.

We do not think the taxpayers were the owners of the timber. Original ownership was in Rayonier Incorporated. Rayonier, in its contracts with Neuskah and E. K. Bishop Lumber Company, specifically sold the timber to those parties, agreeing at the same time to buy back certain species and appropriate language indicating a sale was employed in those contracts. We do not find language importing a sale in the arrangements between the McKay and Carlen partnership and Neuskah and E. K. Bishop. The taxpayers attempt to explain this discrepancy by pointing out that the original written agreement between the partnership and Neuskah, on which the subsequent oral agreements were based, was drafted by a person unskilled in legal terminology. However that may be, it is stipulated that the partnership's business was "logging timber". That term as explained in oral testimony may or may not encompass cutting timber for sale, but on this record we do not think the partnership had any timber for sale. To be sure, McKay and Carlen had a contract to cut the timber in question, but we cannot find that they owned the timber or had any proprietary interest which would permit them to sell it. All sales were made by Neuskah or E. K. Bishop Lumber Company. McKay and Carlen never had any contact with the purchasers, except insofar as E. K. Bishop invoiced itself for logs it retained. This seems simply to have been for bookkeeping purposes and did not purport to evidence a sale by the partnership to Bishop. Absolute title and control of all logs until sold and paid for

remained under the contracts with Neuskah or Bishop. The taxpayers say this was for security only, but we cannot agree.

The agreement between Neuskah and the partnership is essentially a logging arrangement and the amounts payable to the partnership thereunder are said in the contract to be paid "for this service". We conclude that the essence of the arrangement was that the partnership was employed to cut timber on lands of another for compensation determined on the basis of market price of the logs and that the partnership did not own or have any proprietary interest in the timber, either before or after cutting. The statute speaks of the cutting of timber for sale by a taxpayer who has a right to cut such timber. To us this means that the taxpayer who would claim the benefit of the statute must be the one who has not only the right to cut but also the right to sell on his own account. The taxpayers here were not such persons. We agree with the Commissioner that the statutory language does not cover a taxpayer who cuts timber in which he himself has no proprietary interest which he can dispose of by sale.

Neither, in our opinion, can the petitioners qualify as taxpayers cutting the timber "for use in the taxpayer's trade or business" as required by the statute. They were loggers and were cutting timber which belonged to others and was to be used by others. The taxpayers themselves did not use the timber and they had no control over it except to

cut and deliver it according to the terms of their cutting contracts with Neuskah and E. K. Bishop.

We conclude and hold that the petitioners are not entitled to the benefits of section 117 (k) (1) and approve the action of the Commissioner in this respect.

Reviewed by the Court.

Decision will be entered under Rule 50.

The Tax Court of the United States
Washington

Nos. 37662, HELGA CARLEN; No. 37663, JOHN T. CARLEN; No. 37664, CATHRYN McKAY; No. 37665, ARTHUR R. McKAY; No. 42122, ARTHUR R. and CATHRYN McKAY; No. 42123, JOHN T. and HELGA CARLEN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion promulgated May 29, 1953, the parties having filed on June 23, 1953, an agreed computation of tax, now, therefore, it is

Ordered and Decided: That there are deficiencies

in income tax for the years and in amounts as follows:

Year	Taxpayer	Amount
1947	Arthur R. McKay	$ 561.52
1947	Cathryn McKay	561.52
1947	John T. Carlen	548.01
1947	Helga Carlen	548.00
1948	Arthur R. and Cathryn McKay	3,928.78
1948	John T. and Helga Carlen	3,904.26
1949	Arthur R. and Cathryn McKay	3,052.04
1949	John T. and Helga Carlen	3,093.50
1950	Arthur R. and Cathryn McKay	1,405.86
1950	John T. and Helga Carlen	1,401.90

[Seal] /s/ NORMAN O. TIETJENS,
Judge

Entered June 25, 1953.

[Title of Tax Court and Causes.]

STIPULATION OF FACTS

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above entitled taxpayers, by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

1. (a) Arthur R. McKay and Cathryn McKay were at all times herein, husband and wife and residents of Aberdeen, Washington.

(b) John T. Carlen and Helga Carlen were at all times herein, husband and wife and residents of Raymond, Washington.

2. (a) Arthur R. McKay and Cathryn McKay, as members of a marital community, filed separate income tax returns for the calendar year 1947 with the Collector of Internal Revenue, Tacoma, Washington. For the calendar years 1948, 1949 and 1950 they filed joint returns with the Collector of Internal Revenue, Tacoma, Washington.

(b) John T. Carlen and Helga Carlen, as members of a marital community, filed separate income tax returns for the calendar year 1947, with the Collector of Internal Revenue, Tacoma, Washington. For the calendar years 1948, 1949 and 1950 they filed joint returns with the Collector of Internal Revenue, Tacoma, Washington.

3. The income tax returns of the petitioners and the partnership returns of McKay and Carlen may be admitted in evidence, and identified as follows:

Exhibit A—1947 income tax return of John T. Carlen.

Exhibit B—1947 income tax return of Helga Carlen.

Exhibit C—1948 joint income tax return of John T. and Helga Carlen.

Exhibit D—1949 joint income tax return of John T. and Helga Carlen.

Exhibit E—1950 joint income tax return of John T. and Helga Carlen.

Exhibit F—1947 income tax return of Arthur R. McKay.

Exhibit G—1947 income tax return of Cathryn McKay.

Exhibit H—1948 joint income tax return of Arthur R. and Cathryn McKay.

Exhibit I—1949 joint income tax return of Arthur R. and Cathryn McKay.

Exhibit J—1950 joint income tax return of Arthur R. and Cathryn McKay.

Exhibits K, L, M, and N—Partnership returns of McKay and Carlen for fiscal years ended April 30, 1947, April 30, 1948, April 30, 1949 and April 30, 1950, respectively.

4. Arthur R. McKay and John T. Carlen formed an oral general partnership as of May 1, 1945, to engage in logging in Southwest Washington. Said partners were equal partners. Said partnership had a fiscal year ending April 30. Said partnership continued during all the years here involved.

5. The income taxes in dispute as set forth in the respective notices of deficiency are:

Year	Taxpayer	Amount
1947	Arthur R. McKay	$ 561.52
1947	Cathryn McKay	561.52
1947	John T. Carlen	548.01
1947	Helga Carlen	548.00
1948	Arthur R. and Cathryn McKay	3,928.78
1948	John T. and Helga Carlen	3,904.26
1949	Arthur R. and Cathryn McKay	3,071.61
1949	John T. and Helga Carlen	3,093.50
1950	Arthur R. and Cathryn McKay	1,405.86
1950	John T. and Helga Carlen	1,401.90

In the event that the final decision in these cases

is that taxpayers are not entitled to the benefit of Section 117 (k) of the Internal Revenue Code, then the respective tax liability for the taxpayers for the taxable years herein considered is in the exact amount of the tax asserted in the respective notices of deficiency.

6. In the event that the final decision in these cases is that taxpayers are entitled to the benefit of Section 117 (k) of the Internal Revenue Code, then because of certain adjustments it is agreed that recomputation may be submitted under Rule 50 of the Tax Court's Rules of Practice.

7. The single issue in this series of cases is the right of the taxpayers to the benefit of Section 117 (k) of the Internal Revenue Code in computing the income of the partnership, McKay and Carlen, and in computing the tax liability of the partners for each of the years herein involved. It is conceded that the timber in question was valued by the petitioners at the fair market value of said timber as of the first day of each fiscal year, with the exception of the Cedar logged during the fiscal year ended April 30, 1947, which has been conceded by petitioners to have had a market value of $5.00 per thousand feet, rather than $10.58 per thousand feet as claimed on the partnership return, on the first day of the fiscal period.

8. Section 117 (k) (1) and (2) of the Internal Revenue Code is the controlling section here involved. The applicable Regulations are Regulations 111, Section 29.117-8.

9. Taxpayers elected in their respective income

tax returns and in the partnership income tax returns for the years involved to report their gain on the sale of timber under Section 117 (k) of the Internal Revenue Code.

10. The partnership of McKay and Carlen was during all years herein involved in the trade or business of logging timber.

11. The partnership of McKay and Carlen was formed to engage in the logging and cutting of timber. On March 15, 1945, Rayonier Incorporated and Neuskah Timber Company entered into a contract, herein attached as Exhibit 1, and made a part hereof, by the terms of which contract Neuskah purchased from Rayonier all of the merchantable cedar and spruce timber and certain hemlock on Sections 29 and 30, Township 13 North, Range 9, W.W.M., Pacific County, Washington, for $7.50 per thousand board feet for spruce, $4.00 per thousand for cedar and $1.50 per thousand for hemlock. Title to the timber was to pass upon cutting. On April 23, 1945, Neuskah Timber Company entered into a contract with McKay and Carlen for the cutting of the timber included in the contract of March 15, 1945, between Rayonier and Neuskah, except for the timber on the south half of Section 29. Said contract between Neuskah and McKay and Carlen is set forth as Exhibit 2, and made a part hereof. Said contract of April 23, 1945, between Neuskah and McKay and Carlen was subsequently orally amended to include the logging of hemlock at $1.50 per thousand board feet. The timber cut under the contract of April 23, 1945, carried the brand "GH5".

12. McKay and Carlen faithfully performed said contract with Neuskah (later E. K. Bishop Lumber Company) and built and maintained during the term of the contract all roads necessary for the conduct of the logging operations of McKay and Carlen under the terms of said contract without reimbursement. Road building was started in May of 1945 and the first load of logs cut under the Neuskah contract came out on June 5, 1945. For example, under contract GH, the partnership constructed 211½ stations or 21,150 feet of road at the sole expense of the partnership. In addition to road building, the partnership built the necessary spar tree rigging, land preparation, camp site, and colddecks. All the costs of building and maintaining roads necessary for the conduct of logging operations were charged to current operating expense on the partnership books and the partnership income tax returns of McKay and Carlen.

13. McKay and Carlen in addition to making the payments required by the various agreements paid $1.00 per thousand board feet to Neuskah (later E. K. Bishop Lumber Company) as a service fee, as stated in Exhibit 2. During the fiscal year ended April 30, 1947, this service fee amounted to the sum of $8,861.25.

14. Neuskah Timber Company, Inc. was a subsidiary of E. K. Bishop Lumber Company and on January 31, 1946, assigned the contract entered into between Rayonier Incorporated and Neuskah on March 15, 1945, to E. K. Bishop Lumber Company and thereafter McKay and Carlen dealt with

E. K. Bishop Lumber Company in place of Neuskah with regard to the contract entered into between Neuskah and the partnership dated April 23, 1945. A copy of the foregoing assignment is attached hereto as Exhibit 3.

15. E. K. Bishop entered into additional contracts with Rayonier for the purchase of timber in Pacific County and copies of these written contracts are included herein as Exhibits as follows:

Exhibit Number	Date	Brand
Exhibit 4	November 1, 1946	R9
Exhibit 5	August 15, 1948	GH10
Exhibit 6	October 25, 1948	GH11

In each case E. K. Bishop Lumber Company immediately entered into an agreement with McKay and Carlen for the logging of the areas included in these additional contracts between Rayonier and E. K. Bishop Lumber Company. The agreement made between E. K. Bishop Lumber Company and McKay and Carlen was an oral agreement in each instance, made at the time that E. K. Bishop Lumber Company entered into its contracts with Rayonier. These oral agreements contemplated terms and conditions similar to those stated in Exhibit 2, except that the subsequent agreements adjusted the rates of payment by McKay and Carlen as follows:

Contract	Species	Price
R9	Spruce	$ 7.50 and $3.00 per M
	Cedar	4.00 per M
	Hemlock	2.50 per M
GH10 and GH11	Spruce	12.00 and 4.00 per M
	Cedar	7.00 per M

16. McKay and Carlen elected to report their gains on the sale of timber under the various contracts under Section 117 (k) of the Internal Revenue Code and now concede that if the partnership and the partners are otherwise entitled to the provisions of Section 117 (k), that they are entitled to apply Section 117 (k) only with regard to the timber cut under the following contracts identified by brand for each of the years involved:

FY April 30, 1947	GH5
FY April 30, 1948	GH5 and R9
FY April 30, 1949	GH5 and R9
FY April 30, 1950	GH5, R9, GH10 and GH11

17. The timber cut by McKay and Carlen under each contract during each partnership year under the contracts for which the provisions of Section 117 (k) are sought to be applied by taxpayers is set forth in attached exhibits as follows:

Exhibit 7	FY April 30, 1947
Exhibit 8	FY April 30, 1948
Exhibit 9	FY April 30, 1949
Exhibit 10	FY April 30, 1950

18. McKay and Carlen performed their various agreements with Neuskah and E. K. Bishop Lumber Company in accordance with the terms of the agreement identified as Exhibit 2. Payments were made in accordance with the terms of the agreement including the service charge and the stated rates for the various timber species. The balance of the market value of the timber was paid to McKay and Carlen.

19. The partnership owned and acquired certain

heavy logging and roadbuilding equipment and the individual partners owned additional heavy logging and roadbuilding equipment which was made available to the partnership. In addition the partnership from time to time rented equipment from third parties.

/s/ CHARLES F. OSBORN,
Counsel for Petitioner.
/s/ CHARLES W. DAVIS,
Chief Counsel,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Oct. 8, 1952.

[Title of Tax Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

United States Court of Appeal Bldg., United States Courthouse, Seattle, Washington, October 8, 1952—11:30 a.m.

(Met pursuant to notice.)

Before: Honorable Norman O. Tietjens, Judge.

Appearances: John H. Welch, Seattle, Washington, appearing for the Respondent. Charles F. Osborn, Seattle, Washington, appearing for the Petitioner. [1*]

The Court: We will be in order.

The Clerk: 37662, Helga Carlen; 37663, John

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* Page numbering appearing at the top of page of original Reporter's Transcript of Record.

T. Carlen; 37664, Cathryn McKay; 37665, Arthur R. McKay.

Mr. Osborn: Charles F. Osborn, appearing for the petitioner.

Mr. Welch: John H. Welch, appearing for the respondent.

The Court: Mr. Osborn, did you wish to make an opening statement?

Mr. Osborn: Yes, your Honor.

Opening Statement on Behalf of the Petitioner
By Mr. Osborn

Mr. Osborn: May it please the Court, there is actually cases on the Calendar and these have been consolidated, with two additional cases, which are docket cases and the pleadings have been completed, but are not on the Calendar, because the same issue is involved for all of these taxpayers for all years involved, and is the only issue. That issue is the right of these taxpayers to take——

The Court: The other two cases that are not on this docket, you mean you have stipulated that depending on the result here, those cases will be disposed of?

Mr. Osborn: That is correct, your Honor, and in the docket, in the heading on our stipulation we have added those additional two cases. [2]

All these cases have to do with the application of Sec. 11-7K of the Internal Revenue Code. That is the Timber Section, which permits taxpayers under certain circumstances to report the difference between the cost of their timber and the fair market

value of their timber on the first day of each taxable year and to report that difference as capital gain, long-term capital gain, if held over six months and the question involved here is the right of these taxpayers, who incidentally operated in a partnership, McKay and Carlen, to the benefits of this section. The facts in the case have been substantially stipulated, with numerous exhibits. We intend to put on two witnesses to take care of the several points upon which an agreement was not arrived at.

I would like the Court's indulgence for a brief outline of the history of the logging industry in the State of Washington. It will take just several minutes, your Honor, to give you a little better picture of the operation of the petitioners.

When there were vast stands of timber in the State of Washington the large logging companies could economically log these timbers, log this timber, themselves. They would naturally log the easily accessible areas first. And years ago, what was regarded as merchantable timber was considerably different than what it is today. In other words, they would take out the large-sized logs and they would take out what was regarded as [3] the preferable species, for example, fir. Hemlock, for example, was never taken out except for pulp until World War II, when they learned how to dry hemlock and to cut it into lumber. Unfortunately the vast stands of timber in the State of Washington are disappearing. However, many of the large

logging companies have retained ownership of logged-off lands and those areas which are inaccessible by old-line methods of logging. They never decided to log those areas because the logging costs were too high and as long as there was easily accessible timber, why, they neglected these areas. They have continued to hold these timber lands for a number of reasons. Sometimes they expected real estate development, sometimes they expected to log the second growth. Sometimes they expected to use the land and did use the land for reforestation programs, perpetual logging. In other cases they have held the lands, expecting market conditions to change and someday go back and log this inaccessible timber.

Today in the State of Washington these large logging companies are no longer doing their own logging to a great extent. They are employing small operators, independent operators and the petitioners herein, McKay and Carlen, belong to that classification, sometimes called a gyppo logger, with no reflection whatsoever on my clients. The so-called gyppo logger may log under a situation where he, himself, drives a tractor, he may operate a donkey engine, he may actually do the hand work, [4] with perhaps a crew as small as three or four men, sometimes fifteen men. He generally doesn't set up an expensive operation, he doesn't have a bunkhouse, he doesn't have a cookhouse. He often employs local people in the area. And these larger companies today want to get all the merchantable timber off their remaining lands and to do so they

will employ the so-called gyppo logger to remove that timber.

Now, there are various types of contracts that these major logging companies and the gyppos enter into. Sometimes it is what is called a service contract. The large timber owner will build the roads into the timber and he may contract with a gyppo to remove the desired timber at so much a thousand, maybe thirty or forty dollars a thousand. That assures the gyppo recovering his costs and perhaps making a profit. It likewise protects the timber owner in that he can control the operation by supervision and keep control of the logs.

Another type of gyppo contract is one in which the gyppo purchases the timber and the underlying real estate and agrees to remove the logs and to sell the logs back to the original owner.

A third type is one in which the large timber owner sells only the timber and retains title to the real estate and obligates the gyppo contractor or logger to remove the logs and generally to sell back the logs or a certain species of the logs back to the original owner of the land. [5]

Sometimes there is a variation of these three principal types of contracts. In any event, the mills want these logs removed and they are not in a position to do it themselves, because these areas are the remaining inaccessible areas. They are very small operations which do not justify large crews.

In this particular case the so-called large timber owner, is Rayonier, Incorporated, one of the large

timber owners in the State of Washington, also engaged in pulp manufacture.

Because of the shortage of timber there is often arrangements made between the leading companies to exchange timber. Sometimes a company like Rayonier which wants hemlock logs for pulp may make an arrangement with another large operator to purchase hemlock and in return to sell to the second operator a species of log that the second operator wants and in this case we have that situation. A second large timber owner called Bishop Lumber Company, the evidence will show, was primarily interested in spruce logs, because it had a spruce mill operation. McKay and Carlen have no logs, no timber, at the time that the basic contracts we are going to consider were entered into. They were simply experienced loggers. So the facts will show that Rayonier entered into a contract with Bishop for the sale by Rayonier to Bishop of certain logs on certain tracts of land. The facts will further show that Bishop did not do any of the logging itself, that it entered into an agreement with the petitioners herein, McKay and Carlen, to do the actual logging. Now, when I mention the company Bishop, just to clarify your thinking, your Honor, there is an earlier contract with a company called Neuskah, which takes the place of Bishop. The original contract was between Rayonier and Neuskah, and Neuskah is a subsidiary of Bishop Lumber Company, and after the first year Neuskah disappears from our consideration and all further contracts between Rayonier and the next operator were between Ray-

onier and Bishop. There are four contracts here to consider. But in all four contracts, the first one with Neuskah and the second, third and fourth ones with Bishop, McKay and Carlen took over and conducted the actual logging operation.

Now, the principal point to be considered is whether this contract that McKay and Carlen had first with Neuskah and later with Bishop, entitled them to the benefits of Sec. 11, 7-K. It is our contention that under the contract with Neuskah and later the contracts with Bishop, that McKay and Carlen not only agreed to remove the timber but that they actually purchased the timber and that when the timber was dead and down, they sold that timber or sold the logs back to, partly to Bishop, partly to Rayonier and partly to third parties, and that they paid what is called a stumpage price for the timber, that is, they paid to Rayonier, who was the owner of the standing timber so much per thousand for each species of timber removed and the stipulation sets out those arguments. They also paid a service charge to Bishop to handle their paper work in connection with this arrangement. And there were certain other charges, fluming and rafting charges and the net proceeds after the payment of the stumpage and these other charges was the property of McKay and Carlen and they stood to lose or to make money, depending upon the market price that they received for the logs. There was no agreement in any of the contracts fixing the market price. The market price was to be the prevailing market price at the time.

Substantially, your Honor, that is a basic outline of the facts and issues herein presented.

The Court: Thank you.

Mr. Welch, do you have anything to add?

Mr. Welch: A brief statement, your Honor.

Opening Statement on Behalf of the Respondent by Mr. Welch

Mr. Welch: As Mr. Osborn stated, the majority of the facts in this case have been stipulated.

The Court: Do you agree with him on the summary of the history of logging in Washington?

Mr. Welch: I am not as well acquainted as he is, but I have made some inquiry and I think he has made a fair statement as to the background of the industry.

Now, getting right to the point of the case, the Statutory Notice, of course, which states our position in all of these dockets, that brings out the point that the Government's position is that the, that Carlen and McKay had no economic interests in this timber and to develop that a little farther, it is our contention that this contract, the series of contracts which Carlen and McKay had with the E. K. Bishop Lumber Company and with Neuskah in the earlier period were contracts to perform services. And we will argue the case on that basis, that the ownership of the timber was always with Rayonier or Bishop and that the services performed by Carlen and McKay do not invest any form of legal ownership in the timber in them and for that reason it would be impossible to apply the provisions of Sec. 11, 7-K in such a manner that they would be able to claim the capital gains, under the circumstances.

I think that is all I have.

The Court: You may call your witnesses.

Mr. Osborn: Mr. McKay.

The Court: Do you want to offer the stipulation now?

Mr. Welch: We have entered into a stipulation which contains agreement on most of the facts. I have two copies I would like to hand to the Court at this time.

The stipulation in one of the paragraphs states that the tax returns of Carlen and McKay as a partnership and the returns of the individuals for the four years there in controversy may be admitted without further identification and they are each assigned a letter number in the stipulation. Would you prefer that I call these off or that, those would be Respondent's Exhibits A through N, or should I just hand them to the Clerk and have them be marked?

The Court: Are they made part of the stipulation?

Mr. Welch: They are designated in the stipulation by the same letter that's shown on the return.

The Court: I don't think it would be necessary, then, for the Clerk to remark them.

Do you offer them along with the stipulation?

Mr. Welch: I offer them along with the stipulation, yes.

The Court: I understood Mr. Osborn to say that these cases had been consolidated.

Mr. Osborn: By stipulation, your Honor.

Mr. Welch: The stipulation itself does not specificially state in there, except that all of the docket

numbers are shown in the heading of the stipulation. That would include two additional docket numbers for Mr. Carlen and Mr. McKay, for three subsequent years. They're all consolidated in the Statutory Notice, so actually instead of having one year before the Court we have four years before the Court on the same or similar issue.

The Court: Then I will take it, it is agreed that these cases will be heard together and considered to go and decided together.

Mr. Osborn: Yes, sir, your Honor.

Mr. Welch: Yes, sir. [10]

The Clerk: You mean with these two additional cases that are included in here? They have included two cases that are not on this docket, on this Calendar.

The Court: That is the only thing that bothers me, is how to handle those two additional cases which have not been docketed on this Calendar.

Mr. Osborn: The pleadings are completed, your Honor, and we have gone into some length in the stipulation to set out the deficiencies involved. The factual presentation is identical with all of the years involved.

The Court: We will take what steps are necessary to have those cases assigned to this Calendar so we can consider them.

Will you take that up with the Clerk's Office in Washington, Mrs. Silberg.

Mr. Osburn: Mr. McKay, would you please come forward? Whereupon,

ARTHUR R. McKAY

called as a witness for and on behalf of the petitioners, having been first duly sworn, was examined and testified as follows:

Q. By Mr. Osborn: Mr. McKay, where do you reside?

A. Aberdeen, Washington.

Q. Generally in what area of the State of Washington is that located? [11]

A. In the southwest part.

Q. Do you still have some timber down there?

A. Yes.

Q. Not very much, I suppose?

A. No, it is getting a little scarce now.

Q. Mr. McKay, as of May 1, 1945, what was your business?

A. Well, around May 1 of '45, John Carlen and I formed a partnership to remove and purchase and sell timber from a contract with the Neuskah Timber Company.

Q. Have you been a partner at all times since May 1, 1945, with Mr. Carlen?

A. Yes, I have.

Q. What was the purpose of forming the partnership on May 1 of '45?

A. Well, prior to May 1, 1945, we had, we each had equipment which we rented out at so much an hour and operated ourselves.

Q. What kind of equipment?

A. That was Caterpillar tractors and we both built roads and logged. About that time we were

(Testimony of Arthur R. McKay.)

running out of work for this particular company we were working with, so we started looking for timber to log ourselves. And through the cooperation of the Bishop Lumber Company we obtained this tract of timber out of Raymond, Washington.

Q. And since May 1 of 1945, through April 30, 1950, did you carry on a logging operation in this general area of Raymond, Washington? [12]

A. Yes, we did.

Q. Mr. McKay, I hand you a copy of Petitioners' Exhibit 2, which is a part of the stipulation, which is a contract between the Neuskah Timber Company and McKay and Carlen. Would you tell the Court in your own words, what were the circumstances surrounding the execution of that contract?

A. Well, as I told you before, we had been logging around for a contract, or for timber to buy and we located this timber in Raymond that was somewheres near where we had worked before, and due to the fact that, that we were gyppo loggers, as they call us, it was impossible for us to go out and purchase timber, and the only way we could get it was through some other mill which had ways and means of swinging deals. And it so happened that we had worked for the Bishop Company before and due to the fact they had trading stock or hemlock timber that they could trade for spruce timber that was on this particular section that we were looking at, they helped us make the deal.

Q. Who prepared that particular contract, Mr. McKay?

(Testimony of Arthur R. McKay.)

A. The accountant, Mr. Maw. And that contract was——

Q. I was asking you, who prepared the contract, Mr. Maw and yourself?

A. Mr. Maw and myself, yes.

Q. Did you have the benefit of counsel at that time? [13]

A. No, we didn't.

Q. What was your understanding as to your obligation assumed under the terms of that contract?

A. Well, we were to remove and purchase and sell the timber and we were to build our own roads and open up the country ourselves, all at our expense.

Q. Did you understand that you were to remove all of the merchantable timber on the described tract of land?

A. Yes, we were to remove all merchantable timber on the north half of Section 29 and Section 30, which was in the original contract.

Q. Did this type of contract differ from other so-called gyppo contracts with which you had had previous experience, and if so in what way?

A. This contract was entirely different than any contract we had had before. Those that we had had previous, there was a stipulated amount that we were to receive for our services and the companies that we worked for put the access roads in to the timber. But on this deal we had to lay out our own roads, we had to build our own roads, we had to hire trucks, and we had to hire shovels to ballast the

(Testimony of Arthur R. McKay.)

road, and due to the fact that we were buying it on stumpage prices, there was a stipulated price on the price of the stumpage, and that we were, you might say, gambling on what the net results would be, due to the fact that we didn't know what the market price would be. [14]

Q. And you expected to make a profit from this type of contract?

A. Well, using the experience that he had had in the past in logging and using the equipment, we had it pretty well doped out as to what our costs would be and we were sure that the price of the stumpage was fair. And with the present selling price of logs, at that time, we were quite sure that we could make it, and it looked like that the price of logs was going up, which it did.

Q. What brought about the anticipated rise in the price for logs?

A. Well, when the O.P.A. went off, of course, there wasn't any regulations on the price of logs at that time and the demand was so great that the mills started to bid higher on them.

Q. Was there a shortage of fallers and buckers and logging crews during the years involved herein?

A. Well, especially in the first two years, it was terrible, it was hard to get men and those that you did get weren't too reliable.

Q. Were you in a position to negotiate more favorably with Neuskah and Bishop in the years involved here than you otherwise would have been because of these other circumstances?

A. Well, I think so, because they had been in the

(Testimony of Arthur R. McKay.)

logging business themselves and they had a lot of trouble in getting men to work for them, and their primary interest was in the [15] spruce logs to use in their mill. They weren't interested in the logging part of it. So through those connections, why, we were able to make that kind of a deal.

Q. If the market and the log prices had dropped and you had suffered a loss, who would have borne that loss?

A. Well, we would have.

Q. Who built the roads in connection with your logging operation?

A. We built them all. We laid the roads out, spent considerable time laying the country out and finding where the roads should be located, and then we hired men to go in and fall right-of-ways, below the stumps, furnished our own Cats for building the grade, but we did have to hire the trucks and shovels to ballast the roads.

Q. Were you reimbursed for the construction of these roads? A. No.

Q. How far in advance did you normally build these roads?

A. Well, we generally like to have it at least six months and better yet to have a year ahead, because you can't depend on the weather and the cost of road building is so much cheaper during the summer months.

Q. How much did you actually build ahead?

A. We had six or seven months ahead all the time.

(Testimony of Arthur R. McKay.)

Q. I notice in the stipulation that the term "station" is used. What is the reference to that term?

A. That is an engineering term of a hundred feet.

Q. And I notice in the stipulation that in the first year of the contract you built about 211½ stations. That would be approximately four miles?

A. Yes, 21,000 feet or four miles.

Q. I hand you Exhibit No. 4, which is a part of the stipulation, which is a contract between Rayonier, Incorporated, and E. K. Bishop Lumber Company, executed November 1, 1946. How did McKay and Carlen have an interest in that contract?

A. This contract was turned over to us and——

Q. Turned over to you by whom?

A. By the Bishop Company, and we were to go in there and remove and sell the logs and in turn they were to bill the billings out on them. They billed the logs out to the various companies for us, but the contract was turned over to us.

Q. Did you immediately begin to perform your duties under that contract, shortly after it was entered into?

A. Yes, every time that we got a contract, we have got a contract, we have always went in and started building the roads and locating them in order to have work ahead for the yarding crews.

Q. Was your contract between Bishop and McKay and Carlen in writing or was it oral?

A. The original contract was in writing, but the

(Testimony of Arthur R. McKay.)

various contracts that we had afterwards were oral. [17]

Q. To what contract did you look for the terms and conditions under which you were to log the subsequent contracts?

A. That was entirely given us in oral, we, of course, had the maps of the territory, knew all the country there, and as these various contracts were made out by Rayonier, they were handed to us, and we knew which timber we were to go to next.

A. Did the first original contract of McKay and Carlen and Neuskah Timber Company apply in any respect to these subsequent contracts, these oral contracts?

A. Yes, everything helped, in fact, every condition was the same with the exception of one thing, that on some of the later contracts the price of the stumpage raised in accordance with the market price of the logs.

Q. You mentioned that a service fee was paid to E. K. Bishop Lumber Company and the stipulation points out that that fee was $1 per thousand. What was the function, excuse me, what was the service that Bishop Lumber Company was to perform in return for this fee of $1 per thousand?

A. Well, at that time, when we started this particular logging, there was only the two of us. We had two pieces of equipment. We didn't have a regular employed bookkeeper, and it was agreed with them that they should do the billing, take care of the rafting and scaling and in turn charge us, or we would

(Testimony of Arthur R. McKay.)

pay them $1 a thousand, which we thought was as cheap or cheaper than we could do it because of the inexperience, our inexperience [18] with billing out this particular timber.

Q. Your inexperience?

A. Our particular inexperience.

Q. To save the Court's time, I am going to show you Exhibit 5, which is a contract and—Bishop Lumber Company, dated August 15, 1948, and a contract, Exhibit 6, dated October 25, 1948, between Rayonier and Bishop. And ask that, is your testimony with regard to the relationship of McKay and Carlen to these two contracts substantially the same as your testimony with regard to the relationship of McKay and Carlen in the matter of the contract of November 1, 1946 between Rayonier and Bishop?

A. Our agreements on all these contracts were exactly the same, as I said before, with the exception of on the later ones the price of the various timber raised and that was due to the fact that stumpage was priced out very low from the beginning and as the market prices went up, why, of course, the price of stumpage went up in accordance.

Q. Was it the understanding that you were to remove all the merchantable timber from these various tracts?

A. Yes, we were.

Q. One further question, Mr. McKay, was this $1 service charge paid to Bishop for handling your sales and invoicing the same regardless of the type or specie of log sold?

(Testimony of Arthur R. McKay.)

A. Yes, it was the same on all of them.

Mr. Osborn: That is all. [19]

Cross-Examination

Q. By Mr. Welch: Mr. McKay, what were your instructions from Neuskah and the Bishop Company, and Rayonier, with relation to where these roads would be laid out?

A. The roads, in the first two or three years, they were all laid out by ourselves. We had no engineers employed, we had the experience ourself, we laid them out to our best advantage, by ourselves.

The Court: You located them yourself?

The Witness: That is right.

Q. (By Mr. Welch) Did you obtain any advice from Mr. Maw at Bishop or from the Rayonier Company?

A. As to where these should be located?

Q. Yes. A. No, sir.

Q. Were all the logs that were cut on this land delivered to Rayonier or E. K. Bishop by you and your partner?

A. No. Of course, Rayonier was primarily interested in hemlock, that is all they used in their operation. Bishop was interested in spruce. That is all he cut. About the only other species there was cedar and it was bought by the various shingle mills or cedar mills.

(Testimony of Arthur R. McKay.)

Q. However, did you not actually make the sales to these other mills? [20]

A. We paid Bishop this dollar a thousand to take care of that for us.

Q. So that you had actually no contact with the various mills that were going to consume the timber?

A. No, we didn't have to do that because we had him employed at a dollar a thousand to take care of it.

Q. And you actually had no control over who the purchaser was going to be, if Rayonier made the decision as to who was to buy the timber, either Rayonier or Bishop?

A. Well, that was primarily understood when we started out. Rayonier we knew would take the hemlock, because we knew that is what they wanted and then Bishop would take the spruce and then there was the cedar, that was the only other that had to be sold to the outside.

Q. Were there any other loggers on this timberland?

A. In the first couple of years there weren't, but later there was one other logger.

Q. He was put on there by Rayonier or by——

A. By Bishop.

Q. Then you didn't do all of the E. K. Bishop Company's logging?

A. No entirely, no.

Q. All the logs were branded in accordance with

(Testimony of Arthur R. McKay.)

the agreement set up between Rayonier and Bishop—

A. That is right, the diferent locations or different [21] parts of sections had a different brand. Or in other words, too, there was a difference in brand when it come to a change in price, and stumpage, there was a way of cutting off from one price to the other, the various brands.

Q. The brand didn't refer to the particular area from which the log was taken, it referred to the—or did it?

A. I would say it was both. It would pertain to a certain area, because that certain area you were paying so much a thousand for.

Q. I notice you used a brand "R-9" in one instance and also a brand "GH-10" or "GH-11".

A. That would refer to various locations.

Q. Would GH refer to Grace Harbor or——

A. Not necessarily.

Q. And the R had no reference to Rayonier?

A. No. That I couldn't answer you. I wouldn't know.

Q. But those brand names were established between the Bishop and Rayonier Companies?

A. That is right.

Q. With reference to the contract which has been designated Petitioner's Exhibit 4 which is an agreement between Rayonier and Bishop Lumber Company, I would like to direct your attention to the paragraph which is numbered 2, about halfway down the page. Now, is the statement there consist-

(Testimony of Arthur R. McKay.)

ent with your statement that you made on direct examination that you actually [22] purchased this timber from the Bishop Company or from the Rayonier, Incorporated?

A. Now, there is something that I think, I can explain that, too. Here we are a couple of gyppos out there, probably a lot of liabilities and no capital. They had only one way of protecting themselves and the only way they could do it was to hold the title.

Q. In other words, title was actually reserved in Bishop or in Rayonier at all times during these transactions?

A. I would say that. They didn't have any other way of protecting themselves. They couldn't give us a bill of sale for it.

Q. That would interfere with their operations in the sense that perhaps your creditors might attach or place liens on the logs, is that correct?

A. That is true.

Q. Is that your understanding?

A. That is true, yes.

Q. The service fee that was worked out in the contract between you and Neuskah and later E. K. Bishop, that was never actually paid by you and your partner to Bishop, but was deducted from the proceeds of the sale of the logs, is that correct?

A. Yes, that is right, they would, during their billings, rather than then bill us and send them a check, it was deducted [23] at the time they sent us our invoices.

(Witness excused.)

Whereupon,

ROBERT L. AIKEN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Osborn): Will you state your profession?

A. I am a Certified Public Accountant.

Q. How long have you been engaged in public accounting?

A. Nine years.

Q. And where are you presently located?

A. Aberdeen, Washington.

Q. Where were you located prior to going to Aberdeen? A. Seattle.

Q. And with what firm were you associated?

A. In Seattle?

Q. Yes. A. Haskins & Sells.

Q. When did you go to Aberdeen?

A. December 1, 1945.

Q. In your public accounting experience, are you familiar with logging accounting?

A. I am, sir. [24]

Q. What service did you perform for McKay and Carlen?

A. From December of '45 until about September of '48, I or people directly under my supervision kept all the records for McKay and Carlen. In other words, our firm was the bookkeepers for McKay and Carlen. After, subsequent to that date, my only

(Testimony of Robert L. Aiken.)

working connection with McKay and Carlen was assisting in the preparation of their Federal Income Tax returns.

Mr. Osborn: Would you mark those, please?

(The document above referred to was marked Petitioners' Exhibit 11 for identification.)

The Clerk: Petitioners' Exhibit 11.

Q. (By Mr. Osborn) I hand you Petitioners' Exhibit 11, marked for identification, and ask you to tell us what that document is.

A. That is an invoice for logs sold to E. K. Bishop Lumber Company, spruce logs.

Q. What relation does that document bear to the operations of McKay and Carlen?

A. Attached to this is a computation, a breakdown, of this invoice. This invoice is, in other words, a complete raft. Attached is a breakdown of the logs belonging to McKay and Carlen, which is included in that particular raft.

Q. How is that indicated, how is it indicated that certain logs belong to McKay and Carlen?

A. By the brand number. All the logs in this particular [25] raft, GH-5, belong to McKay and Carlen.

Q. You received a copy of that invoice in your office, did you?

A. That is right.

Q. What did you do with that invoice?

A. Well, that became a copy of our sales invoice and was entered in our sales journal in the regular course of business.

(Testimony of Robert L. Aiken.)

Q. You stated that you or someone in your employ kept the books for McKay and Carlen during 1945 and subsequent periods. When did you stop that? A. When did we stop?

Q. Yes.

A. Well, we, I can't give you the exact date. It was, I believe, September of '48. We had an office in Raymond, Washington, and at that time we sold that office, and the files and so forth of McKay and Carlen went along with that sale, so——

Q. Now, with reference to the document which has been marked for identification as Petitioners' Exhibit 11, you stated that that constituted a sale or an invoice resulting from a sale by McKay and Carlen. Now, could you explain just your reasoning on the use of the word "sale" here, on the strength of the document?

A. Well, now, this is a sale, I would assume to the E. K. Bishop Lumber Company. It says "Sold to E. K. Bishop Lumber Company." [26]

Q. Yes, but it is on their letterhead.

A. Well, it is my understanding that McKay and Carlen were paying Bishop to take care of their billing.

Q. You made further reference to the brand numbers on here; you referred to "GH-5." You don't of your own knowledge know whether McKay and Carlen, were the actual owners of the brand number "GH-5," do you?

A. Well, as far as I ever knew, they were the owners of logs branded GH-5, yes.

(Testimony of Robert L. Aiken.)

Q. But your knowledge isn't based on an examination of contracts or agreements or anything of that sort?

A. Well, it is based on examination of the contracts and discussion with McKay and Carlen and various other people that had anything to do with these logs.

Q. But so far as this exhibit is concerned, it does represent a billing from E. K. Bishop Company to E. K. Bishop Company?

A. On the face of it, that is what it says, yes.

Q. And that would be consistent with other testimony that there was never a title of this lumber with McKay and Carlen?

A. I am not qualified to answer that. I don't know. As I said before, as far as I know, the reason it was, the reason it came this way was that McKay and Carlen were paying for that service. We could have done that billing and billed Bishop for it, but it was already taken care of. This became the same as [27] the Accounting Department's copy of the sales invoice right here.

Q. This invoice does detail the service charge that you refer to, is that correct?

A. That is right, this dollar a thousand here, these reference numbers here, "SJ," that has been entered on Sales Journal 27, and the stumpage has been entered on the purchase journal and also other expenses in connection with that.

Mr. Welch: That is all.

Mr. Osborn: I offer in evidence.

(Testimony of Robert L. Aiken.)

The Court: Do you have any objection, Mr. Welch?

Mr. Welch: Yes, I would like to object to this, the admission of this exhibit. My objection is qualified to this extent, that I object to the, any of the, testimony which relates to the use of the words purchase and sale, in connection with the relation between Carlen and McKay and the E. K. Bishop Lumber Company, so the objection is more to the use of the terms than the document itself.

The Court: Well, I will admit the exhibit.

The Clerk: Petitioners' Exhibit 11 admitted.

(The document above referred to as Petitioners' Exhibit No. 11 was received in evidence.)

Mr. Osborn: I would like these marked.

(The documents above referred to were marked Petitioners' Exhibit Nos. 12 and 13 for identification.)

Q. (By Mr. Osborn): I hand you Petitioners' Exhibit 12, [28] marked for identification, which is just to shorten your testimony, if it please the Court, and I also intend to hand you Petitioners' Exhibit No. 13, marked for identification, which appear to be similar in all respects to Petitioners' Exhibit 11, except that the purchasers, or let us say, the invoices indicate the words "sold to Rayonier, Inc." on Petitioners' Exhibit No. 13, and Petitioners' Exhibit No. 12 says "sold to E. C. Miller Cedar Lumber Company." Now, is your testimony with re-

(Testimony of Robert L. Aiken.)

gard to these two invoices substantially the same as your testimony with regard to Petitioners' Exhibit 11?

A. Yes. These are just different companies that have got different species of timber is all, it is the same type of dealings.

Q. (By Mr. Welch): A question, Mr. Aiken, similar to the other question. These exhibits are invoices of a sale between E. K. Bishop Lumber Company and the concern which has been designated after the printed word, "sold to" on the invoice, is that correct?

A. I would say so, yes.

Q. And the only reference to Carlen and McKay on these offered exhibits is the typed matter with reference to the various brand names?

A. This appeared on the copy we got. It didn't of course appear on the copy that Rayonier got (indicating).

Mr. Osborn: I offer these invoices at this time, [29] Petitioners' Exhibit 12 and Petitioners' Exhibit 13 for admission.

Mr. Welch: No objection.

The Court: Admitted.

(The documents above referred to as Petitioners' Exhibits Nos. 12 and 13 were received in evidence.)

Q. (By Mr. Osborn): Just to clarify one point, with reference to those last exhibits, the computation with reference to McKay and Carlen, I pre-

(Testimony of Robert L. Aiken.)

sume, appears only on the copies of the invoices sent to your office or to McKay and Carlen?

A. I would imagine so, yes.

Mr. Osborn: No further questions.

Mr. Welsh: No further questions.

Mr. Osborn: Your Honor, that concludes the petitioners' case.

The Court: Mr. Welch?

Mr. Welch: That concludes the respondent's case.

Mr. Osborn: May I ask the Court's indulgence for 60 day for briefs, inasmuch as I think I will be away for two weeks in November and we will have a delay in obtaining the transcript and the question of communications between here and Washington, D.C.

The Court: Mr. Welch, I take it you are going to be busy, too? [30]

Mr. Welch: It is speculative, I think I will. I would prefer in this case that simultaneous briefs be submitted.

Mr. Osborn: That is satisfactory.

Mr. Welch: And that 60 days would be highly satisfactory to me.

The Court: Well, simultaneous briefs are all right with me so long as the parties don't have a conflict on the suggested findings of fact. In this case where most of the facts are stipulated, I don't see that is going to develop, and I will accept simultaneous briefs in 60 days.

Mr. Osborn: There will be an argument on the ultimate fact.

The Court: 60 days and 30 days to reply.

The Clerk: December 8th and January 7th for reply briefs.

The Court: We will recess until 2 o'clock.

The Clerk: Will you show that photostats may be substituted for Petitioners' 11, 12 and 13.

(Thereupon, at 12:35 o'clock, p. m., the hearing in the above-entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed October 22, 1952.

In The United States Court of Appeals
For The Ninth Circuit

[Title of Causes.]

PETITION FOR REVIEW

John T. and Helga Carlen, and Arthur R. and Cathryn McKay, the Petitioners in the causes above listed, by their counsel, Charles F. Osborn, hereby file their consolidated petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States, entered on June 25, 1953, subsequent to an opinion of said Court rendered on May 29, 1953, 20 T. C. No. 77, determining deficiencies in Petitioners' federal income taxes, as follows:

Year	Taxpayer	Docket No.	Amount
1947	Arthur R. McKay	37665	$ 561.52
1947	Cathryn McKay	37664	561.52
1947	John T. Carlen	37663	548.01
1947	Helga Carlen	37662	548.00
1948	Arthur R. and Cathryn McKay	42122	3,928.78

Year	Taxpayer	Docket No.	Amount
1948	John T. and Helga Carlen	42123	3,904.26
1949	Arthur R. and Cathryn McKay	42122	3,052.04
1949	John T. and Helga Carlen	42123	3,093.50
1950	Arthur R. and Cathryn McKay	42122	1,405.86
1950	John T. and Helga Carlen	42123	1,401.90

The six docketed causes herein were by stipulation heard and decided together, there being but one underlying issue, the same for all taxable years and all taxpayers.

The Petitioners respectfully show:

I.—Venue

Petitioners, Arthur R. McKay and Cathryn McKay are members of a marital community and reside at Aberdeen, Washington. Petitioners, John T. Carlen and Helga Carlen are members of a marital community and reside at Raymond, Washington.

For the calendar year 1947 the members of each community filed separate federal income tax returns. For the calendar years 1948, 1949 and 1950 each community filed joint returns. All returns were filed with the Collector of Internal Revenue, Tacoma, Washington.

II.—Nature of the Controversy

The controversy relates to the proper determination of Petitioners' liability for federal income taxes for the calendar years 1947, 1948, 1949 and 1950.

In 1945, Petitioners, Arthur R. McKay and John T. Carlen, formed a partnership to purchase, log

and cut timber in southwestern Washington. On April 23, 1945 this partnership entered into a contract with Neuskah Timber Company to purchase, log and cut certain standing timber previously purchased by Neuskah, located on the land of a third party.

McKay and Carlen were to remove the timber, build and pay for all necessary roads themselves, and to sell certain designated species to Neuskah (later Bishop) or to Rayonier, Incorporated and had the right to sell species other than those certain designated species, to third parties. McKay and Carlen paid fixed stumpage for the timber as cut and engaged Neuskah (later Bishop) to act as sales agent for the partnership and to handle all invoicing at a fixed rate per thousand.

In January 1946 Neuskah's parent corporation, E. K. Bishop Lumber Company, assumed Neuskah's position vis-a-vis the landowner on the one hand and McKay and Carlen on the other. Thereafter, in 1946 and 1948, McKay and Carlen took additional contracts with Bishop, on terms like the original Neuskah contract.

From 1945 through 1950 the partnership of McKay and Carlen performed the aforesaid contracts. The gain realized under the contracts was reported by Petitioners and their wives, in either separate or joint returns as indicated above, as long term capital gains under Section 117 (k) (1) of the Internal Revenue Code. It is conceded in the Stipulation that Petitioners are not entitled to the provision of Section 117 (k) (1) except as to those contracts held

for more than six (6) months prior to the commencement of each taxable year herein under review.

The Commissioner of Internal Revenue ruled that Petitioners were not entitled to the benefits of Section 117 (k) (1), and that all of the net proceeds of the contracts were ordinary income to Petitioners, and determined deficiencies for the years 1947, 1948, 1949 and 1950, as detailed above.

The Tax Court approved the action of the Commissioner in its opinion promulgated May 29, 1953, and decision was thereupon entered under Rule 50 of the Tax Court Rules of Practice, against Petitioners in all cases, the date of this decision being June 25, 1953.

III.—Assignment of Errors

The Petitioners assign as error the following acts and omissions of the Tax Court of the United States:

1. The finding that Petitioners are not entitled to compute their gain realized on the sale of timber, purchased and cut in accordance with the subject contracts, under Section 117 (k) (1) of the Internal Revenue Code.

2. The finding that Petitioners, through their partnership, McKay and Carlen, were not engaged in the business of cutting timber for sale on their own account.

3. The finding that the cedar logs were to be sold to Bishop.

4. The finding that the partnership of McKay and Carlen did not have any timber for sale.

5. The finding that Neuskah (later Bishop) did not retain title to the timber until cut and sold for security purposes.

6. The finding that the partnership of McKay and Carlen was employed to cut the timber for compensation.

7. The finding of deficiencies against all Petitioners for the years 1947, 1948, 1949 and 1950, in lieu of a determination that there is no income tax due from Petitioners for any of the years in controversy, except as admitted by Petitioners in the Stipulation of Facts.

8. The making and entering by the Tax Court of the United States of its decision is contrary to the evidence and the law.

IV.—Prayer

The Petitioners herein, being aggrieved by the above decision of the Tax Court of the United States, desire to obtain a review of this decision, and of all the proceedings heretobefore had before the Tax Court of the United States, by the United States Court of Appeals for the Ninth Circuit, to the end that the errors and omissions of the Tax Court of the United States may be corrected and that the Tax Court of the United States may be directed to enter an order in each of the above entitled causes showing "No deficiency," except to the extent admitted by Petitioners in the Stipulation of Facts.

/s/ CHARLES F. OSBORN
Counsel for Petitioners

State of Washington,
County of King—ss.

Charles F. Osborn, being first duly sworn, says:

That he is counsel of record in the above named causes; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

/s/ CHARLES F. OSBORN

Subscribed and sworn to before me this 15th day of September, 1953.

[Seal] /s/ C. CALVERT KNUDSEN
Notary Public in and for the State of Washington, residing at Seattle.

Service of copy of Petition for Review acknowledged this 17th day of September, 1953.

/s/ KENNETH W. GEMMILL
Acting Chief Counsel, Internal Revenue Service Attorney for Respondent

[Endorsed]: T.C.U.S. Filed September 17, 1953.

The Tax Court of the United States
Washington

[Title of Causes.]

CERTIFICATE

I. Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 30, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review" in the proceedings before The Tax Court of the United States entitled "Helga Carlen, John T. Carlen, Cathryn McKay, Arthur R. McKay, Arthur R. and Cathryn McKay and John T. and Helga Carlen, Petitioners, vs. Commissioner of Internal Revenue, Respondent, Docket Nos. 37662, 37663, 37664, 37665, 42122 and 42123" and in which the petitioners in The Tax Court proceedings have initiated a consolidated appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 14th day of October, 1953.

[Seal] /s/ VICTOR S. MERSCH.
Clerk, The Tax Court of the
United States

[Endorsed]: No. 14090. United States Court of Appeals for the Ninth Circuit. Helga Carlen, John T. Carlen, Cathryn McKay, Arthur R. McKay, Arthur R. and Cathryn McKay and John T. and Helga Carlen, Petitioners, vs. Commissioner of Internal Rvenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: October 22, 1953.

/s/ PAUL P. O'BRIEN.
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14090

HELGA CARLEN, et al., Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS

The points upon which appellants intend to rely on appeal are as follows:

1. The Tax Court of the United States erred in finding that appellants are not entitled to compute their gain realized on the sale of timber, purchased and cut in accordance with the subject contracts, under Section 117 (k) (1) of the Internal Revenue Code.

2. The Tax Court of the United States erred in finding that appellants, through their partnership, McKay and Carlen, were not engaged in the business of cutting timber for sale on their own account.

3. The Tax Court of the United States erred in finding that appellants' cedar logs were to be sold to E. K. Bishop Lumber Company only.

4. The Tax Court of the United States erred in finding that the partnership of McKay and Carlen did not have any timber for sale.

5. The Tax Court of the United States erred in finding that Neuskah Timber Company (later Bishop) did not retain title to the timber until cut and sold for security purposes.

6. The Tax Court of the United States erred in finding that the partnership of McKay and Carlen was employed to cut the timber for compensation.

7. The Tax Court of the United States erred in finding deficiencies against all appellants for the years 1947, 1948, 1949 and 1950 in lieu of a determination that there is no income tax due from appellants for any of the years in controversy, except as admitted by appellants in the Stipulation of Facts.

8. The Findings and Conclusion as set forth in the Opinion of the Tax Court of the United States pertaining to the foregoing are contrary to the evidence and in accordance with law for the following reasons:

(a) The facts found, and upon which the Court's decision is based, are not supported by substantial evidence and are contrary to the testimony of witnesses as to the ownership of the logs and the right to sell the logs cut by appellants.

(b) The Court's decision is contrary to the facts found.

(c) The Court erred in interpreting the requirements of Section 117 (k) (1) of the Internal Revenue Code.

Dated October 30, 1953.

/s/ CHARLES F. OSBORN,
Counsel for Petitioners

Proof of Service attached.

[Endorsed]: Filed October 31, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between the parties through their respective counsel that all of the exhibits in the above-entitled consolidated cases may be considered as parts of the printed record, and that the parties may refer to the exhibits in their respective briefs and oral argument.

November 13, 1953.

/s/ CHARLES F. OSBORN,
Counsel for the Petitioners.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General,
Counsel for the Respondent.

[Endorsed]: Filed November 16, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

STIPULATION REDUCING RECORD

It Is Hereby Stipulated, by and between the parties through their respective counsel, that the following cases with the Tax Court of the United States designation, which cases were consolidated for hearing before said Tax Court and are consolidated for purpose of appeal:

Helga Carlen, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Tax Court Docket

No. 37662; John T. Carlen, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 37663; Cathryn McKay, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 37664; Arthur R. McKay, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 37665; Arthur R. and Cathryn McKay, Petitioners, vs. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 42122; John T. and Helga Carlen, Petitioners, vs. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 42123;

present common questions which when determined will decide all of the six listed cases; that the variations in the pleadings are only as to names of petitioner, amounts involved and taxable years; that the pleadings in John T. Carlen and Helga Carlen, husband and wife, Petitioners, vs. Commissioner of Internal Revenue, Docket No. 42123, shall alone be printed as part of the printed transcript and that the pleadings in the five companion cases be considered as part of the printed record and that the parties may refer to the pleadings in their respective briefs and oral argument.

It is therefore respectfully requested that this Court permit the printing of the pleadings in John T. Carlen and Helga Carlen, husband and wife, Petitioners vs. Commissioner of Internal Revenue, Docket No. 42123, The Tax Court of The United States, as part of the printed transcript in this appeal and that the pleadings in the five companion

cases need not be printed as part of the printed transcript.

/s/ CHARLES F. OSBORN,
Counsel for Petitioners.
/s/ H. BRIAN HOLLAND,
Assistant Attorney General,
Counsel for the Respondent.

December 18, 1953.

Upon the above Stipulation It Is So Ordered.

Dated December .., 1953.

.....
Judge, United States Court
of Appeals.

[Endorsed]: Filed Dec. 21, 1953, Paul P. O'Brien, Clerk.

No. 14090

United States Court of Appeals

For the Ninth Circuit

HELGA CARLEN, JOHN T. CARLEN, CATHRYN McKAY, ARTHUR R. McKAY, ARTHUR R. and CATHRYN McKAY and JOHN T. and HELGA CARLEN, *Appellants,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Appellee.*

APPEAL FROM THE TAX COURT OF THE UNITED STATES

BRIEF OF APPELLANTS

CHARLES F. OSBORN
LESTER T. PARKER
Attorneys for Appellants.

603 Central Building,
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THE ARGUS PRESS, SEATTLE

No. 14090

United States Court of Appeals

For the Ninth Circuit

HELGA CARLEN, JOHN T. CARLEN, CATHRYN McKAY, ARTHUR R. McKAY, ARTHUR R. and CATHRYN McKAY and JOHN T. and HELGA CARLEN, *Appellants,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Appellee.*

APPEAL FROM THE TAX COURT OF THE UNITED STATES

BRIEF OF APPELLANTS

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APPEAL FROM THE TAX COURT OF THE UNITED STATES

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This is an appeal from a final decision entered by the Tax Court of the United States. Appellants petitioned the Tax Court of the United States for a determination that no additional income taxes beyond those agreed upon by stipulation were due for the taxable years 1947 to 1950 inclusive as claimed by the Commissioner of Internal Revenue. The Tax Court rendered a final decision adverse to appellants and timely notice of appeal was thereupon given. This appeal is taken pursuant to the provisions of Title 26, U.S.C.A. Section 1141.

STATEMENT OF THE CASE

The controversy relates to the proper determination of appellants' liability for federal income taxes for the calendar years 1947, 1948, 1949 and 1950. Appellants Arthur R. McKay and Cathryn McKay are members

of a marital community residing at Aberdeen, Washington. Appellants John T. Carlen and Helga Carlen are members of a marital community residing at Raymond, Washington. For the calendar year 1947 the members of each community filed separate federal income tax returns. For the calendar years 1948, 1949 and 1950 each community filed joint returns. All returns were filed with the Collector of Internal Revenue, Tacoma, Washington.

In 1945 appellants, Arthur R. McKay and John T. Carlen, formed a partnership to purchase, log, cut and sell timber in the southwestern part of the State of Washington. On April 23, 1945, the partnership entered into a contract with Neuskah Timber Company to purchase, log, cut and sell certain standing timber previously purchased by Neuskah, located on the land of a third party, Rayonier, Incorporated. The partnership was to purchase and remove all merchantable timber, build and pay for all necessary roads and to sell certain species of logs to Neuskah (later Bishop) or to Rayonier and had the right to sell other species to third parties. The partnership paid fixed stumpage as the timber was cut and sold and engaged Neuskah (later Bishop) to act as sales and billing agent for the partnership at $1.00 per thousand.

In January, 1946, Neuskah merged with its parent corporation, E. K. Bishop Lumber Company, and Bishop assumed Neuskah's contract with the partnership. In 1946 and 1948 Bishop entered into three additional contracts with Rayonier and immediately orally assigned them to the partnership on the same terms as

the original contract between Neuskah and the partnership, except for different stumpage prices.

From 1945 through 1950 the partnership performed the aforesaid contracts. Gain realized under the contracts was reported by appellants as long term capital gain under Section 117(k)(1) of the Internal Revenue Code. It is agreed by stipulation that appellants are not entitled to the provisions of Section 117(k)(1) of the Internal Revenue Code except as to those contracts held for more than six (6) months prior to the commencement of each taxable year herein under review. The Tax Court affirmed the Commissioner's determination that appellants are not entitled to the benefits of Section 117(k)(1) and that all gain realized is taxable as ordinary income and from the decision of the Tax Court this appeal is taken.

QUESTIONS PRESENTED

1. Were appellants engaged in logging under a service contract or were they logging and selling timber for their own account?

2. Are the appellants entitled to report their gains realized on the sale of timber as capital gains under Section 117(k)(1) of the Internal Revenue Code?

SPECIFICATION OF ERROR

The appellants assign as error the following acts and omissions of the Tax Court:

1. The finding that appellants are not entitled to compute their gain realized on the sale of timber, purchased and cut in accordance with the subject contracts, under Section 117(k)(1) of the Internal Revenue Code.

2. The finding that appellants, through their partnership, McKay and Carlen, were not engaged in the business of cutting timber for sale on their own account.

3. The finding that Neuskah (later Bishop) did not retain title to the timber until cut and sold, for security purposes only.

4. The finding that the partnership was employed to cut timber for compensation only.

5. The finding of deficiencies in income tax against all appellants for the taxable years 1947 through 1950 inclusive, in excess of the amounts agreed upon by stipulation.

6. The decision of the Tax Court is contrary to the evidence and the law for the following reasons:

(a) The findings of fact upon which the Court's decision is based, are not supported by substantial evidence and are contrary to the testimony of all witnesses as to the ownership of the timber and the right to sell the timber cut by the partnership.

(b) The Court's decision is contrary to the facts as found.

(c) The Court erred in interpreting the requirements of Section 117(k)(1) of the Internal Revenue Code.

ARGUMENT

A. Appellants Had a Contract Right to Cut Timber for Sale for Their Own Account

The partnership entered into four contracts with Neuskah and Bishop for the purchase of timber on a pay-as-cut basis, with the terms set forth in the first contract dated April 23, 1945 (Exhibit No. 2; Tr. 16). The three subsequent contracts were oral and were in accordance with the first contract except as to variations in stumpage prices (Stip. 15). The first contract was later orally amended to include hemlock (Stip. 11). It is submitted that the contract and the parties' interpretation of the contract clearly show that the partnership had a contract right to cut and sell timber and that the Tax Court's findings of facts are not supported by the preponderance of the evidence.

1. *Risk of Loss*

The partnership assumed the entire risk of loss of the operation. It was not entitled to reimbursement of any kind for its expenditures. On the other hand, all profits realized on the timber belonged to the partnership (Exhibit No. 2; Tr. 16, 47, 48, 49). This is definitely not a contract for the performance of logging services for in the service type of contract the logger is paid a fixed fee for timber cut regardless of specie (Tr. 39, 47).

2. *Roads*

The partnership built all the necessary roads at its own expense and built roads six to seven months in advance of logging operation (Stip. 12; Tr. 47, 48, 49, 50,

53). In a service type of contract the owner builds and pays for the roads (Tr. 39, 42, 47).

3. *Invoicing*

The partnership engaged Neuskah (later Bishop) to invoice all logs of the partnership to the buyer, hemlock to Rayonier, spruce to Bishop and fir and cedar to third parties. For this service Neuskah (later Bishop) charged the partnership $1.00 per thousand (Stip. 13; Tr. 51, 52, 54, 58, 59, 60; Exhibits 2, 11, 12, 13).

Bishop invoiced the logs in its own name and sent copies of the invoices together with detailed information to McKay and Carlen to indicate the amount due the partnership for its logs as the sales were usually for rafts of logs including the logs of owners other than McKay and Carlen. In accordance with the basic contract the logs were trucked to Willapa Harbor and were scaled, rafted and towed to the designated delivery points; all these expenses were borne by the partnership. It would be wasteful for Bishop to send out a number of invoices to the buyer to cover the logs of each owner included in the raft and identified by different brand names so one invoice in the name of Bishop was used for each raft as is shown in the exhibited invoices (Exhibits 11, 12, 13) and individual accounting was made to each owner on a memorandum sheet sent to the owner with a copy of the invoice for each raft or the data appeared on the foot of the invoice where space permitted. The invoices show the raft number, the brands of the various owners, quantities and species of logs of each owner with extended pricing. In the case of McKay and Carlen deductions were taken for stump-

age, booming, rafting and scaling charges, and $1.00 per thousand for invoicing and handling disbursements of the proceeds (Exhibits 11, 12, 13; Tr. 58, 59).

The Tax Court specifically erred in its conclusion as to the significance of the invoicing (Tr. 24). There is absolutely no evidence to support the Court's finding that Bishop's invoicing to itself was "for bookkeeping purposes" only. The uncontradicted testimony of the independent certified public accountant, Aiken, together with an examination of the invoices themselves clearly indicate that Bishop was selling the logs for McKay and Carlen (Tr. 58, 59, 60). Bishop had to invoice itself for logs of McKay and Carlen and other parties because the logs belonged to McKay and Carlen and the other owners (Exhibit 11).

The Court failed to attach significance to Mr. Aiken's testimony with reference to the markings on Exhibit 11, "SJ 27" and "PJ 27" meaning that the sales price had been entered on Sales Journal 27 and the stumpage had been entered on the purchase journal of the partnership (Exhibit 11; Tr. 60). On Exhibit 13 there is found the accountant's markings placed on the invoice when received by the partnership indicating that the gross sales price should be entered on "Sales Journal 21" and that the stumpage payments should be entered on "Purchase Journal 20." The manner in which the partnership handled the accounting for these transactions indicates clearly that the appellants at all times considered that they were purchasing and selling the timber.

4. *Discount*

Further evidence that the invoicing of Bishop was for

the account of McKay and Carlen is found in the fact that Bishop was entitled to and did take the customary cash discount of 1% on sales to itself (Exhibit 11) which is the same discount taken on sales to Rayonier and to E. C. Miller Cedar Lumber Company (Exhibits 12 and 13). Certainly if Bishop was at all times the owner of the timber as found by the Court then why did Bishop invoice itself for the spruce, why did it take a 1% discount for prompt payment?

5. *Stumpage*

The basic contract between Neuskah and the partnership was not prepared by counsel but by Mr. Maw, accountant for Neuskah and Arthur R. McKay (Tr. 47). While they attempted to follow the earlier contract between Rayonier, the original owner of the timber, and Neuskah, they used terms familiar to them and drew a contract which they regarded as adequate. The uncontradicted testimony of Mr. McKay as to the meaning of the contract is entitled to great weight. The contract itself, when interpreted by those familiar with logging terms is definitely a contract of purchase. The contract states "The parties hereto agree that from the total net cash return from the *sale* of all logs shall be deducted '*stumpage*' * * *" (Italics ours).

Loggers understand the term "stumpage" when used in the sense of payment, to mean payment for the timber at time of cutting or sale. Basically there are two principal types of arrangements for the purchase of timber, lump-sum payment or "pay-as-cut." The subject contract is of the latter type. In the pay-as-cut purchase, the term stumpage is used to express the measure

of payment. Chapman and Meyer in their book "Forest Valuation," page 363, state:

> "Pay-as-cut is distinguished from lump-sum payments, which are frequently made for timber purchased in small quantities from woodlots for immediate cutting. In the former case, the payment is based on the measured quantity of timber in the log or after sawing, subsequent to cutting, and thus conforms directly to the actual quantities purchased. Lump sum payments, by contrast, are purchases of standing timber previous to cutting, on the basis of a cash offer for the timber as it stands. Such transactions are often made without the benefit even of estimates of the volume and quality of the standing trees and nearly always work to the detriment of the owner, who may receive only about one-half of the sum that he would realize by pay-as-cut methods based on *stumpage* prices segregated by species, products, and quality." (Italics ours)

Walter Mucklow in "Lumber Accounts," page 441, defines "stumpage" as "The price per thousand feet paid for standing timber * * *."

> " * * * 'Stumpage' is a term used to express the price paid or to be paid by the purchaser for standing trees to be severed from the soil and converted into timber or logs by the purchaser." *Neidlinger v. Mobley,* 76 Ga. App. 599, 46 S.E.(2d) 747, 750 (1948)

6. *Retention of Title*

The Tax Court emphasized the fact that while Rayonier reserved title to the timber until cut, Neuskah (later Bishop) as between itself and the partnership reserved title until the logs were cut and sold (Tr. 24,

25). As stated by Mr. McKay, title was retained for a longer period by Neuskah because of the fact that the partnership had limited financial resources as compared to Neuskah and Bishop and the seller thought it necessary to protect itself as long as possible (Tr. 56).

In other business fields it is a common practice for the money lender or prior owner to retain title until sale such as in trust receipt financing and flooring arrangements, yet no one questions the fact that the merchant is the owner of the goods sold and is acting for his own account and not as agent for the lender or prior owner.

If Neuskah and Bishop were only having the partnership act as service loggers and the partnership had nothing to sell (Tr. 24, 25), then why did Neuskah (later Bishop) need to make any reference to reserving title, particularly as to spruce, all of which was purchased by Bishop from the partnership. In other words, if Neuskah (later Bishop) as between itself and the partnership at all times owned the timber, then no purpose was served by specifically reserving title until the logs were sold. An examination of the basic contract shows that the draftsmen of the contract were not guilty of verbosity; in fact, only the first contract was written, the other three were oral.

7. *Logging Restrictions*

The partnership was required to cut the timber in a definite manner and to operate forty-eight hours per week (Exhibit 2). These conditions cannot be construed to make a contract of purchase one of service. The contract of March 15, 1945 (Exhibit 1), between Rayonier and Neuskah and the three subsequent contracts be-

tween Rayonier and Bishop all had similar provisions requiring the purchaser to

> "go upon said lands and commence operations hereunder immediately, and * * * carry on such operations diligently and continuously to completion."

Yet the Tax Court correctly found that the Rayonier contracts were contracts of sale (Tr. 24). The land owner on a pay-as-cut basis wants to make certain that the timber will be removed as soon as possible. Buttrick in "Forest Economics and Finance," page 368, states:

> "Stumpage is bought and sold under the following forms of agreements: (1) Land and timber are sold jointly; (2) the purchaser buys all timber without buying the land and without any conditions as to time or method of removing the timber; (3) the seller disposes of all or part of the timber with stipulations as to time for removal, methods of operation, and so on, and retains the land.
>
> "A sale including land and timber is fair to both parties providing the price is fair to both. One involving only the timber, but without stipulation as to time in which it is to be removed, ordinarily is completely against the interests of the landowner because it gives the purchaser the effective use of the property as long as he desires, leaving the landowner only the satisfaction, if any, of ownership and the duty of paying taxes. Such sales occasionally are made by owners who think that the timber is to be removed at once; later they learn the import of a bad bargain."

The fact that the hemlock was to be sold to Rayonier and the spruce to Neuskah and Bishop at the prevailing market price at the time of the sale does not make the

transaction less than a sale by the partnership. See *Springfield Plywood Corporation v. Commissioner,* 15 T.C. 697 (1950), where title was retained until timber was cut and where the prior owner had first right to buy back the logs, yet the Court held the agreement to be a sale or disposal of the timber.

8. *Business of Partnership*

The Tax Court drew an improper inference from the stipulation of facts in which it was stipulated that the partnership was engaged in the "trade or business of logging timber" (Stip. 10). It is obvious that counsel for the appellee would not specifically agree in the stipulation that the term "logging" included "the purchase and sale of timber" but insisted that if the appellants were engaged in the business of purchasing and selling of timber then they would have to put on proof to that effect, which was done by the uncontradicted testimony of McKay and Aiken (Tr. 47, 48, 50, 51, 52).

9. *Method of Payment*

No merit should be given to the argument that since Neuskah (later Bishop) collected all receipts and paid all expenses including stumpage and its own service fee of $1.00 per thousand, that the partnership never "paid" the items deducted by Neuskah and Bishop. It is a matter of common knowledge that selling agents for timber, fish and agricultural products often do all the bookkeeping and deduct all charges and make all remittances for the actual owner of the product without effecting any change in the legal relationship of principal and agent.

B. Appellants Are Entitled to Report Their Timber Sale Gains as Capital Gains Under Section 117(k)(1) of the Internal Revenue Code

It is established by the evidence that the partnership had a contract right to cut timber and to sell the logs purchased under the cutting contract for its own account and that the contracts were held for the required holding period and that it took the proper method of electing to take the benefit of Section 117(k) and the corresponding benefit of Section 117(j) in its tax returns (See Appendix).

Section 117(k)(1) clearly provides that its provisions can be elected by a "taxpayer who * * * has a contract right to cut * * * timber." There is no requirement in the statute that the taxpayer must have a prior proprietary interest in the timber for then he would be the owner of the timber and is clearly covered by the statute, but the statute goes on to provide that the statute covers a taxpayer who has "a contract right to cut" and who realizes gain on the sale of the timber. The partnership had a contract right to cut timber and did realize and retain the gains from the sale of the timber.

As stated by the Tax Court this is a case of first impression (Tr. 22) and an examination of the legislative history is helpful as is a review of the articles of authors who have studied Section 117(k).

The report of the Senate Finance Committee of the Senate, Revenue Bill of 1943, 1944 C.B. 973, 993, states:

> "Your committee is of the opinion that various timber owners are seriously handicapped under the Federal income and excess profits tax laws. The law discriminates against taxpayers who dispose of

> timber by cutting it as compared with those who sell timber outright. The income realized from the cutting of timber is now taxed as ordinary income at full income and excess profits tax rates and not at capital gain rates. In short, if the taxpayer cuts his own timber he loses the benefit of the capital gain rate which applies when he sells the same timber outright to another. Similarly, owners who sell their timber on a so-called cutting contract under which the owner retains an economic interest in the property are held to have leased their property and are therefore not accorded under present law capital-gains treatment of any increase in value realized over the depletion basis."

The Court of Claims statement in *Boeing v. United States,* 98 F.Supp. 581 (1951), as quoted by the Tax Court (Tr. 23):

> "The legislative history of 117(k) indicates that Congress' principal purpose was to afford relief to timber owners."

does not and could not mean that the section was not to apply to persons having a contract right to cut timber. In fact the Court refused to limit Section 117(k)(2) to leases when the defendant (United States) attempted to apply such a restriction by relying on the Senate Finance Committee Report.

In the hearings before the Committee on Ways and Means, House of Representatives (78th Congress, 1st Session) for the Revenue Act of 1943, the statement of Lowell H. Parker, appearing for the Forest Industries Committee on Timber Valuation and Taxation (active sponsors of Section 117(k)) given on October 14, 1943, page 799, states:

"Operators who hold contracts giving them the right to cut timber from the land of another are in practically the same situation as the forest owners who cut their own timber and should be accorded the same relief. In general, the proportion of capital gain to operating profit will be less than in the case of the forest owner who cuts his own timber because usually the time for which held is less.

"Forest property owners who cut their own timber and operators who cut timber from the land of another under a contract, would be equitably treated under our proposed section 117(k)(1) which has been submitted to this committee."

William A. Hamilton in the Florida Law Journal, November, 1949, in his article "Gain or Loss on the Cutting and Disposal of Timber," gives his interpretation of Section 117(k) in the following example at pages 312 and 313:

"An example will illustrate the operation of section 117(k)(2): Refer again to Atlantic Lumber Company and its tract of timber, in which Atlantic has a depletion basis or cost of $5.00 per thousand feet. On June 1, 1947, at a time when Atlantic had owned the timber more than six months, it executed a cutting contract or lease in favor of Baker Lumber Company, also a manufacturer and seller of lumber at wholesale. The contract provides that Baker shall have the right for five years to enter upon certain portions of Atlantic's tract, to cut and remove specified timber, for which Atlantic is to be paid as cut the sum of $10.00 per thousand feet. Under the contract Atlantic retains title to the land and title to all timber until actually cut by Baker. In 1948 Baker cut one million feet of timber from the tract and paid Atlantic the required sum of

$10,000.00 therefor. Since Atlantic's depletion basis in the timber so cut is $5,000.00, the excess of $5,000 received by Atlantic is treated and taxed under section 117(k)(2) as a long term capital gain in the taxable year 1948 if total gains exceed losses under section 117(j). Under the pre-1943 law, the $5,000.00 excess received by Atlantic would have been taxed as ordinary income. *To further illustrate the over-all operation of section 117(k), if the one million feet of timber cut by Baker in 1948 had a fair market value of $15.00 per thousand feet on January 1, 1948, and the timber was cut by Baker for sale or for use in its business, Baker, by electing the provisions of section 117(k)(1) for the taxable year 1948 also could obtain capital gains treatment on $5,000.00. That is, if Baker's total gains exceed losses under section 117(j), it would obtain capital gains rates with respect to the timber cut in 1948 based on the difference between the January 1, 1948, fair market value of $15.00 per thousand feet and Baker's depletion basis of $10.00 per thousand feet.*" (Emphasis ours)

The same interpretation of Section 117(k) is to be found in a pamphlet written by Charles W. Briggs, "Timber Valuation and Taxation," published by Forest Industries Committee, 1319 18th Street N. W., Washington 6, D. C., in which he states at page 13:

"CASE TO WHICH THE PROVISION IS APPLICABLE. Section 117(k)(2) applies to an owner of timber:

"1. Who owns timber for more than six months before disposal; and

"2. Who disposes of it under a contract by virtue of which he retains an economic interest.

"It is safe to say that an economic interest is retained by the owner where he is to be paid:

"(a) so much per M as the stumpage is cut;

"(b) out of the production from the stumpage disposed of; or

"(c) out of the gross proceeds of the sale of the product of the stumpage by his transferee.

"(*It should be mentioned here that the taxpayer who acquires timber under such a contract is entitled to the benefits of Section 117(k)(1), that is, when he cuts the timber the difference between his cost under the contract and the market value is entitled to capital gains and loss treatment, as explained above in Division 1*)." (Emphasis ours)

The same analysis of 117(k) is made in a handbook prepared by the United States Department of Agriculture. "The Small Timber Owner and His Federal Income Tax" (1953) in which the preface contains the statement "This publication has been reviewed and approved by the Bureau of Internal Revenue, Department of the Treasury, Washington, D. C."

C. W. Shatley, certified public accountant, states in his article "Capital Gain Under Section 117(k)(1) of the Code," appearing in "Taxes," February, 1953, page 135:

"In essence, a timber-cutting contract (sometimes called 'timber lease') is merely a license granted by the owner of timber permitting the cutting of timber on his lands. (Of course, the ownership of the timber and the land may be held by different persons but this is rare.) Ordinarily, the owner of the timber will be paid per M board feet of logs removed, with a different price for each species. Sometimes, a lump-sum payment is made for all the timber on a tract of land with the risk of quantities falling on the purchaser.

"The various types of cutting contracts are too numerous to cover in this article. However, the Bureau has been attacking the classification of some contracts as cutting contracts under the statute where, because of title-retention provisions or covenants to sell the logs to the timber owner, the form does not comport precisely with the most common form of cutting agreement. Where a rise or fall in the market value of timber rebounds to the benefit or detriment of the logger, it would seem to be in keeping with the spirit of Section 117(k)(1) to permit the logger to report the cutting as a sale or exchange regardless of technicalities concerning the form of the contract."

CONCLUSION

Since the decision of the Tax Court is not supported by the evidence and since the Court did not properly apply the applicable law, the decision should be reversed.

Section 117(k)(1) is not ambiguous and its clear intent entitles the appellants to the benefit of said section either on the basis that appellants purchased the timber and were the owners thereof at all times (subject to the reservation of title for security purposes) or had a contract right to cut such timber and to sell the timber or logs in the regular course of appellants' business and that the evidence clearly establishes that all other requirements of Section 117(k)(1) were met by appellants and their partnership.

Respectfully submitted,

CHARLES F. OSBORN
LESTER T. PARKER
Attorneys for Appellants.

APPENDIX

Section 117(j) of the Internal Revenue Code states in part:

"(j) Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.

"(1) Definition of Property Used in the Trade or Business. For the purposes of this subsection, the term 'property used in the trade or business' * * * includes timber with respect to which subsection (k)(1) or (2) is applicable."

Section 117(k)(1) provides:

"(k) Gain or Loss in the Case of Timber or Coal.

"(1) If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. In case such election has been made, gain or loss to the taxpayer shall be recognized in an amount equal to the difference between the adjusted basis for depletion of such timber in the hands of the taxpayer and the fair market value of such timber. Such fair market value shall be the fair market value as of the first day of the taxable year in which such timber is cut, and shall thereafter be considered as the cost of such cut timber to the taxpayer for all purposes for which such cost is a necessary factor. If a taxpayer makes an election under this paragraph such election shall apply with respect to

all timber which is owned by the taxpayer or which the taxpayer has a contract right to cut and shall be binding upon the taxpayer for the taxable year for which the election is made and for all subsequent years, unless the Commissioner, on showing of undue hardship, permits the taxpayer to revoke his election; such revocation, however, shall preclude any further elections under this paragraph except with the consent of the Commissioner.''

No. 14,090

In the United States Court of Appeals for the Ninth Circuit

HELGA CARLEN, JOHN T. CARLEN, CATHRYN MCKAY, ARTHUR B. MCKAY, ARTHUR R. AND CATHRYN MCKAY AND JOHN T. AND HELGA CARLEN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
HILBERT P. ZARKY,
MEYER ROTHWACKS,
Special Assistants to the Attorney General.

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OPINION BELOW

The opinion of the Tax Court (R. 14-26) is reported at 20 T.C. 573.

JURISDICTION

The consolidated petition for review (R. 64-69) involves deficiencies in individual income taxes for the taxable years 1947 to 1950, inclusive. (R. 15.)[1] Sepa-

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[1] The amounts have been stipulated, as follows (R. 29):

Year	Taxpayer	Amount
1947	Arthur R. McKay	$ 561.52
1947	Cathryn McKay	561.52
1947	John T. Carlen	548.01
1947	Helga Carlen	548.00
1948	Arthur R. and Cathryn McKay	3,928.78
1948	John T. and Helga Carlen	3,904.26
1949	Arthur R. and Cathryn McKay	3,071.61
1949	John T. and Helga Carlen	3,093.50
1950	Arthur R. and Cathryn McKay	1,405.86
1950	John T. and Helga Carlen	1,401.90

rate notices of deficiency, covering the taxable year 1947, were mailed to each of the taxpayers on August 24, 1951.[2] A joint notice of deficiency, covering the taxable years 1948, 1949, and 1950, was mailed to the taxpayers John T. Carlen and Helga Carlen on March 21, 1952 (R. 6-7); on the same date a joint notice of deficiency covering the same period was mailed to the taxpayers Arthur R. McKay and Cathryn McKay. Separate petitions for redetermination were filed with the Tax Court, under the provisions of Section 272 of the Internal Revenue Code, by each of the taxpayers, for the taxable year 1947, on November 19, 1951. A joint petition for redetermination was filed by the taxpayers John T. Carlen and Helga Carlen, for the taxable years 1948, 1949, and 1950, on June 17, 1952 (R. 3-11); on the same date, a joint petition for redetermination was filed by the taxpayers Arthur R. McKay and Cathryn McKay, covering the same period.

The decision of the Tax Court sustaining the Commissioner's determinations of deficiencies was entered June 25, 1953. (R. 2.) The cases are brought to this Court by a consolidated petition for review filed by the taxpayers on September 17, 1953. (R. 64-69.) Jurisdiction is conferred on this Court by Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

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[2] By stipulation reducing the record (R. 74-76), only the pleadings in *John T. Carlen and Helga Carlen* v. *Commissioner,* No. 42,123 have been printed as part of the record; the pleadings in the remaining cases, as well as all of the exhibits in all of the cases (R. 74), may be considered as part of the record before this Court for the purpose of briefs and argument.

QUESTION PRESENTED

Whether the Tax Court correctly held that amounts received by the taxpayers under certain contracts for the cutting of timber constituted ordinary income and were not long-term capital gains within the meaning of Section 117 (k) (1) of the Internal Revenue Code, where the taxpayers had no proprietary interest in the cut timber, no right to sell it or to use it in their own business, and where the amounts were received merely as compensation for services rendered.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(j) [as added by Sec. 151 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Sec. 127 (b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" * * * Such term also includes timber with respect to which subsection (k) (1) * * * is applicable.

* * * * *

(k) [as added by Sec. 127 (a) of the Revenue Act of 1943, *supra*] *Gain or Loss Upon the Cutting of Timber.*—

(1) If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale

or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. In case such election has been made, gain or loss to the taxpayer shall be recognized in an amount equal to the difference between the adjusted basis for depletion of such timber in the hands of the taxpayer and the fair market value of such timber. Such fair market value shall be the fair market value as of the first day of the taxable year in which such timber is cut, and shall thereafter be considered as the cost of such cut timber to the taxpayer for all purposes for which such cost is a necessary factor. If a taxpayer makes an election under this paragraph such election shall apply with respect to all timber which is owned by the taxpayer or which the taxpayer has a contract right to cut and shall be binding upon the taxpayer for the taxable year for which the election is made and for all subsequent years, unless the Commissioner, on showing of undue hardship, permits the taxpayer to revoke his election; such revocation, however, shall preclude any further elections under this paragraph except with the consent of the Commissioner.

* * * * *

(26 U.S.C. 1946 ed., Sec. 117.)

STATEMENT

Most of the facts were stipulated (R. 27-35) and were adopted by the Tax Court as its findings of facts (R. 15). Some oral testimony was taken. (R. 45-63.) The facts may be summarized and explained as follows:

As of May 1, 1945, Arthur R. McKay and John T. Carlen formed an oral general partnership to engage in the logging and cutting of timber in Southwest Washington. During all the years in question, the partnership was engaged in the trade or business of logging timber and was not engaged in the business of cutting timber for sale on its own account or for use in its business. (R. 16.)

On March 15, 1945, Rayonier Incorporated and Neuskah Timber Company entered into a contract by the terms of which Neuskah purchased from Rayonier all of the merchantable cedar and spruce timber and certain hemlock located on tracts described in the contract and owned by Rayonier. Title to the timber and risk of loss by fire or other casualty was to pass to Neuskah on cutting. Rayonier was to designate the hemlock to be cut and all logs were to be branded with a distinctive design approved by Rayonier. Neuskah agreed to sell back to Rayonier and Rayonier agreed to buy all hemlock logs cut under the contract. (R. 16.)

On April 23, 1945, Neuskah entered into the following contract with the McKay and Carlen partnership for cutting part of the spruce and cedar included in the Rayonier-Neuskah contract (R. 16-19):

> This contract, made and entered into by and between the Neuskah Tbr. Co. Inc., a corporation, of Aberdeen, Washington, hereinafter called First Party and Arthur R. McKay and John Carlen, of

Aberdeen, Washington, a co-partnership, hereinafter known as McKay & Carlen, and hereinafter called Second Party, Witnesseth:

That First party owns or controls certain timber in Section Thirty (30) and North Half (N½) of Section Twenty-Nine (20) [*sic*], Township Thirteen (13) North, Range Nine (9) West, W. M., Pacific County, Washington.

Second Party agrees to selective log all the merchantable Sitka Spruce and Western Red Cedar on the above described land in accordance with the usual custom. In the conduct of said operation the Second Party agrees to comply with and conform to all the requirements of law now or hereafter during the term of the contract in effect relating to the operation of cutting, logging and removal of timber, or to fire or the prevention of fire and shall hold First Party harmless from any and all damages resulting from the negligence acts of the Second Party or its agents and employees. Upon completion of logging any definite tract Second Party agrees to leave such land, tract or tracts in such condition that certificate of clearance can be obtained from the State departments pertaining to logging and fire.

All logs when cut shall be branded or stamped with a brand or stamp suitable to the First Party, and absolute title and control of all logs, until sold and paid for, shall rest in the First Party.

All Select, Number One (1) and Number Two (2) Sitka Spruce logs are to be delivered to the mill of E. K. Bishop Lumber Company, Aberdeen, Washington. All other Sitka Spruce and all Western Red Cedar logs are to be delivered to any mill or mills on Willapa Harbor, such mill or mills to be designated by First Party.

Second Party agrees to operate at least Forty Eight (48) hours per week and to do each and everything necessary to log and deliver said logs to the various mills and agrees to construct and maintain all necessary roads, furnish all necessary equipment and supplies, do all falling, bucking, yarding, loading, trucking, booming, rafting, scaling and towing and to pay when due all labor, state and federal taxes of every kind and nature whatsoever, including but not limited to industrial insurance, unemployment compensation, medical aid, and agrees to keep said logs free from any and all claims, liens or liability.

The Parties hereto agree that from the total net cash returns from the sale of all logs shall be deducted stumpage of Seven Dollars Fifty Cents ($7.50) on all Sitka Spruce logs and Four Dollars ($4.00) on all Western Red Cedar logs, plus One Dollar ($1.00) on all logs, per thousand feet board measure, and that after such deductions the balance shall be paid by First Party to Second Party for this service, such payments to be made within ten (10) days after said logs are rafted and scaled, such scaling to be done by any recognized scaling bureau, to be selected by First Party.

Time is of the essence of this contract and Second Party agrees to start operations promptly and continue said logging without interruption, barring such factors as bad weather or strikes which are beyond Second Party's control.

It is expressly understood and agreed that in all its logging operations hereunder the Second Party acts as and is an independent contractor and nothing herein contained shall operate to make the Second Party an agent of the First Party or to be construed as authorizing or empowering the Sec-

ond Party to obligate or bind the First Party in any manner whatsoever. It is expressly understood and agreed the First Party and Second Party are not partners or principal or agent.

Neuskah was a subsidiary of E. K. Bishop Lumber Company. On January 31, 1946, Neuskah assigned its contract with Rayonier to E. K. Bishop Lumber Company and thereafter McKay and Carlen dealt with the assignee with regard to the contract. The assignment was approved by Rayonier. (R. 19.)

On November 1, 1946, August 15, 1948, and October 25, 1948, Rayonier and E. K. Bishop Lumber Company entered into additional contracts similar in material respects to the contract between Neuskah and Rayonier. At the time these additional contracts were entered into E. K. Bishop Lumber Company immediately entered into an agreement with McKay and Carlen for the logging of the areas described in the contracts between Rayonier and Bishop. The agreements with McKay and Carlen were oral and contemplated terms and conditions similar to those stated in the contract of April 23, 1945, between Neuskah and McKay and Carlen. Under the basic contracts between Rayonier and Neuskah and E. K. Bishop, Neuskah and Bishop retained the spruce for themselves, but resold all the hemlock and cedar to Rayonier at the market price. (R. 19-20.)

McKay and Carlen faithfully performed its contracts and payments have been made in accordance therewith, including the service charge of $1 per thousand board feet to Neuskah (later E. K. Bishop Lumber Company). McKay and Carlen logged the timber at their own expense and charged all of the costs, including road build-

ing, to current operating expenses. They received the net cash returns from the sale of the logs, less the stumpage charge agreed upon and a service fee deducted by E. K. Bishop Lumber Company, which conducted all the selling, collected the proceeds, and remitted to McKay and Carlen the net amount. (R. 20.)

McKay and Carlen elected to report their gains on the sale of timber under the various contracts under Section 117 (k). (R. 20.)

The Tax Court found that the McKay and Carlen partnership was not the owner of the timber which was the subject of its contracts with Neuskah and Bishop; that although it had the right to cut the timber in question it had no proprietary interest therein which would permit it to sell the timber. It found that all sales were made by Neuskah or Bishop; that the partnership had no contact with purchasers, except insofar as Bishop invoiced itself for logs which it retained. However, the Tax Court concluded that this was simply for bookkeeping purposes and did not purport to evidence a sale by the partnership to Bishop. Absolute title and control of all logs until sold and paid for remained under the contracts with Neuskah or Bishop and the Tax Court rejected the contention that this was merely for the purpose of security. (R. 24-25.)

The Tax Court found that in essence the partnership was operating under a logging arrangement, under which it was to cut timber on lands of another and was to be compensated for the service rendered in an amount based on the market price of the logs. The partnership, it concluded, had no right to sell the timber on its account; it did not cut the timber for use in its trade or business; and it had no control over the timber except to

cut it and deliver it according to the terms of the contracts with Neuskah and Bishop. (R. 25-26.)

Under the circumstances, the Tax Court sustained the Commissioner's determination that the taxpayers were not entitled to the benefits of Section 117 (k) of the Code. (R. 26.)

SUMMARY OF ARGUMENT

The taxpayers, who received funds by virtue of their execution of a contract to cut certain timber were, nevertheless, as the Tax Court held, not entitled to the capital gains benefits afforded by Section 117 (j) (1) and (k) (1) of the Internal Revenue Code. They were not owners of the timber either before or after cutting, and had no right to sell it or to use it in their own trade or business. There was no compliance, therefore, with the conditions of Section 117 (k) (1). Upon examination of all the facts, including the contracts entered into, the Tax Court found that the taxpayers had in essence merely obligated themselves to render services for which they were entitled to compensation based on a fixed formula, and that the amounts received constituted ordinary income.

ARGUMENT

The Taxpayers Were Not Entitled to the Benefits of Section 117 (k)(1) of the Code Since They Were Not Owners of the Timber Cut, and Had No Right Either to Sell It or to Use It in Their Own Trade or Business

The sole question in this case is whether the taxpayers are entitled to the benefits of the capital gains provisions of Section 117 (k) (1) of the Internal Revenue Code, *supra*. The statute permits a taxpayer to elect upon his return to have the cutting of timber considered as if there were an actual sale or exchange of the timber

cut in a given taxable year. The cutting of the timber must be "for sale or for use in the taxpayer's trade or business" and the taxpayer must be one "who owns, or has a contract right to cut" it. If he has owned the timber or has held the contract right for the requisite period, gain is then recognized "in an amount equal to the difference between the adjusted basis for depletion of such timber in the hands of the taxpayer and the fair market value of such timber." Under Section 117 (j) (1) of the Code, *supra,* the term "property used in the trade or business" (afforded capital gain treatment under Section 117 (j) (2)) includes timber "with respect to which subsection (k) (1) * * * is applicable."

The Tax Court, upon consideration of the virtually undisputed basic facts (R. 15-20), held that the taxpayers were not entitled to the benefits of Section 117 (k) (1). It construed the statute to apply (1) to a taxpayer who was (1) either an owner of timber cut or (2) who had a contract right to cut timber, provided that it was cut either for sale by him or for use in his business. The taxpayers do not contend that this construction of the statute is erroneous. Upon an analysis of the facts, the Tax Court found that the taxpayers did not own the timber in question and did not cut it for sale by them or for use in their own trade or business. On the contrary, it found that under the agreements in question the taxpayers merely performed services for which they were compensated on the basis of the formula stipulated in the written and oral contracts. Hence, it concluded that since the plain requirements of Section 117 (k) (1) were not met, the taxpayers did not qualify for the capital gains benefits under the

statute, but that the compensation which they received for services rendered constituted ordinary income.

The Tax Court was correct in its construction of the statute and in its application of the facts thereto. As to the meaning of the statute, its provisions are plain and unambiguous. It provides, in part:

> If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who *owns* * * * such timber (providing he has *owned* such timber * * * for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. (Emphasis supplied.)

Under this portion of the statute, it is obvious that ownership is a requisite. In this connection, as the Tax Court has pointed out (R. 22-23), the legislative history of the statute indicates that its main purpose was to grant relief to timber owners who were cutting their own timber rather than selling it outright. S. Rep. No. 627, 78th Cong., 1st Sess., p. 19 (1944 Cum. Bull. 973, 993), contains the following statement:

> Your committee is of the opinion that various timber owners are seriously handicapped under the Federal income and excess profits tax laws. The law discriminates against taxpayers who dispose of timber by cutting it as compared with those who sell timber outright. The income realized from the cutting of timber is now taxed as ordinary income at full income and excess profits tax rates and not at capital gain rates. In short, if the taxpayer cuts his own timber he loses the benefit of

> the capital gain rate which applies when he sells the same timber outright to another. Similarly, owners who sell their timber on a so-called cutting contract under which the owner retains an economic interest in the property are held to have leased their property and are therefore not accorded under present law capital-gains treatment of any increase in value realized over the depletion basis.

Cf. *Boeing* v. *United States,* 98 F. Supp. 581 (C. Cls.). There, the taxpayer entered into contracts with logging companies which were to cut, remove and sell timber and which were to pay over to the taxpayer certain specified amounts. The case involved an interpretation of Section 117 (k) (2) of the Internal Revenue Code, with which we are not here concerned. Nevertheless, in discussing the legislative history of Section 117 (k), the court did state (p. 584):

> The legislative history of 117 (k) indicates that Congress' principal purpose was to afford relief to *timber owners.* * * * (Italics added.)

The Tax Court here concluded that the taxpayers were not the owners of the timber in question. The evidence clearly supports that conclusion. The original ownership of the timber was in Rayonier. On March 15, 1945, that company contracted with Neuskah to sell to it all of the merchantable spruce and timber and certain of the hemlock located in specified tracts. Under the specific terms of the contract, title to the timber and risk of loss by fire or other casualty was to pass to Neuskah on cutting. Neuskah agreed to sell back to Rayonier and Rayonier agreed to buy all hemlock logs cut under the contract; Rayonier was to designate

the hemlock to be cut and all logs were to be branded with a distinctive design approved by it. On April 23, 1945, Neuskah entered into a contract with the McKay and Carlen partnership for cutting part of the spruce and cedar included in the Rayonier-Neuskah contract. By the explicit terms of this contract, the parties agreed that "absolute title and control of all logs, until sold and paid for" shall rest in Neuskah. (R. 17.) When the timber was cut, it was to be delivered by the partnership to mills specifically designated by Neuskah. The partnership bound itself to operate for at least 48 hours per week and to log selectively all timber of the species designated. The contract provided that "for this service", (R. 18), Neuskah was to pay to the partnership an amount equal to the net cash returns from the sale of the logs minus fixed stumpage on the various species and minus a service charge of one dollar per thousand board feet. On January 31, 1946, Neuskah, with Rayonier's approval, assigned this contract to the E. K. Bishop Lumber Company, its parent organization. Thereafter, on November 1, 1946, August 15, 1948, and October 25, 1948, Rayonier and Bishop entered into contracts similar in material respects to the contract between Neuskah and Rayonier, and, on the same dates, Bishop and the partnership entered into oral logging agreements, the terms and conditions of which were similar to those stated in the April 23, 1945, contract between Neuskah and the McKay and Carlen partnership. Under all of the basic contracts between Rayonier, on the one hand, and Neuskah and Bishop, on the other, Neuskah and Bishop retained the spruce for themselves, but resold all the hemlock and cedar to Rayonier at the market price. The McKay and Carlen

partnership performed the services and received payment therefor in accordance with the agreements. Bishop conducted all the sales, collected the proceeds and remitted the net amount to the partnership. (R. 16-20.)

Upon these facts, the Tax Court had ample basis for concluding that the timber was sold by Rayonier to Neuskah and Bishop, that "appropriate language indicating a sale was employed" in the contracts between those parties, and that there was no "language importing a sale in the arrangements between the McKay and Carlen partnership and Neuskah and E. K. Bishop." (R. 24.) Before the Tax Court, as here (Br. 8), the taxpayers, in the words of the Tax Court (R. 24), attempted—

> to explain this discrepancy by pointing out that the original written agreement between the partnership and Neuskah, on which the subsequent oral agreements were based, was drafted by a person unskilled in legal terminology. * * *

The rebuttal of this attempted explanation is that there is no evidence, certainly none of a persuasive or conclusive nature, that the partnership owned the timber or had any proprietary interest therein. True, it had a contract to cut the timber, but, as the Tax Court found (R. 16, 24, 25), during all the years in question, the McKay and Carlen partnership was engaged only in the business of logging, not in the business of cutting timber for sale on its own account or for use in its own business. Further, all sales were made by Neuskah or Bishop and the partnership never had any contact with purchasers, except insofar as Bishop invoiced itself for logs it retained. This was confirmed by the testimony

of Arthur R. McKay, who, it may be noted, did not deny that the partnership had no control in the selection of purchasers. (R. 54.) In short, as the Tax Court concluded (R. 25)—

> the essence of the arrangement was that the partnership was employed to cut timber on lands of another for compensation determined on the basis of market price of the logs and that the partnership did not own or have any proprietary interest in the timber, either before or after cutting. * * *

The Tax Court was not obliged, as the taxpayers in effect urge (Br. 8), to accept the testimony of one of the interested parties concerning the meaning of the partnership's contracts, even if it be assumed, *arguendo,* that Mr. McKay's testimony was uncontradicted. *Blumenthal* v. *Commissioner,* 21 B.T.A. 901; *Quock Ting* v. *United States,* 140 U.S. 147.

The taxpayers' view that the explicit reservation of title by Neuskah and Bishop was for security purposes only (Br. 9-10) represents at the most only a choice of possibly conflicting inferences; the Tax Court stated (R. 25)—"we cannot agree." Nor can we agree with the taxpayers' statement (Br. 8-9) that the basic contract between the partnership and Neuskah should be construed as a contract of purchase because it provided that *stumpage* was to be deducted from the total net cash return from the *sale* of all logs. The term "sale" in this provision is, at the most, equivocal; it is as applicable to sale by Neuskah or Bishop (as the Tax Court found) as it is to sale by the taxpayers. As to the significance of the term "stumpage", the sense of the Tax Court's conclusion is that it was merely a mathematical

factor to be used in determining the amount of compensation to be paid the partnership for services rendered.

The taxpayers contend (Br. 7-8) that the invoicing by Bishop indicates that Bishop was selling for the partnership and had to invoice itself because the logs belonged to McKay and Carlen and other owners. However, the Tax Court found that the invoicing "seems simply to have been for bookkeeping purposes and did not purport to evidence a sale by the partnership to Bishop." (R. 24.) This would certainly appear to be a permissible inference, especially since absolute title and control of all logs until sold and paid for remained, under the contracts, with Neuskah and Bishop.

As we have observed, Section 117 (k)(1) applies to one who owns timber, and the Tax Court concluded upon the facts before it that the taxpayers here did not qualify as owners. The benefits of the statute extend also to a taxpayer who has a "contract right to cut" timber. However, in context, the cutting of the timber must be "for sale or for use in the taxpayer's trade or business." Nothing in the language of the statute or in its legislative history suggests that the mere contract right to cut, absent a right to sell the cut timber or to use it in one's own trade or business, entitles one to the benefits of Section 117 (k)(1). Nor do the taxpayers here contend otherwise. The gist of their argument (Br. 18) is that they come within the statute "either on the basis that * * * [they] purchased the timber and were the owners thereof at all times * * * or had a contract right to cut such timber *and to sell the timber or logs in the regular course of* * * * [*their*] *business* * * *." (Emphasis supplied.) The Tax Court found—from the evidence considered above in connection with its conclu-

sion that the taxpayers did not own or have any proprietary interest in the lumber either before or after cutting—that the taxpayers did not have "any proprietary interest which would permit them to sell it." (R. 24.) Further, the Tax Court found (R. 25-26) that the taxpayers did not cut the timber in question "for use in the taxpayer's trade or business," as required by the statute, but that, on the contrary,

> They were loggers and were cutting timber which belonged to others and was to be used by others. The taxpayers themselves did not use the timber and they had no control over it except to cut and deliver it according to the terms of their cutting contracts with Neuskah and E. K. Bishop.

These findings, as well as the findings that the taxpayers did not own the timber which was the subject of their contracts with Neuskah and Bishop, are based upon substantial evidence, are not clearly erroneous, and should be sustained. Rule 52 (a), Federal Rules of Civil Procedure; *United States* v. *Gypsum Co.,* 333 U.S. 364, 394-395, rehearing denied, 333 U.S. 869.

The taxpayers rely upon *Springfield Plywood Corp.* v. *Commissioner,* 15 T.C. 697, to support their contention (Br. 11-12) that, despite the provisions for sale of the cut timber to Rayonier, Neuskah and Bishop under the basic contracts between those parties, the sales should nevertheless be regarded as made by the partnership. But, as the Tax Court stated (R. 22), *Springfield Plywood Corp.* is not controlling here. That case involved Section 117 (k) (2) of the Code which provides that in the case of the *disposal* of timber held for more than six months prior to such disposal, by the *owner* thereof under any form or type of contract by virtue

of which the owner retains an economic interest in the timber, gain may be determined on the basis of the difference between the amount received for the timber and its adjusted depletion basis. The narrow question in that case was whether the owner of timber "disposed" of it by contracting for its cutting, the parties having agreed (p. 702) that the owner did retain an economic interest in the timber. Section 117 (k)(1) and (2) cover different situations. Under Section 117 (k)(1), a taxpayer may elect to come within its terms only if he is a timber owner or has held a contract right to cut timber for sale or use in his trade or business. Under Section 117 (k)(2), the retention of an economic interest by an owner of timber who disposes of it under any form or type of contract will entitle him to the benefit of the capital gains provisions. As to the instant case, the Tax Court observed (R. 22): "Both parties agree that section 117 (k)(2) has no application to the situation before us."

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
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Special Assistants to the Attorney General.

APRIL, 1954.

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No. 14090

United States Court of Appeals

For the Ninth Circuit

HELGA CARLEN, JOHN T. CARLEN, CATHRYN McKAY, ARTHUR R. McKAY, ARTHUR R. and CATHRYN McKAY and JOHN T. and HELGA CARLEN, *Appellants,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Appellee.*

APPEAL FROM THE TAX COURT OF THE UNITED STATES

REPLY BRIEF OF APPELLANTS

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APPEAL FROM THE TAX COURT OF THE UNITED STATES

REPLY BRIEF OF APPELLANTS

A. INTRODUCTION

The Tax Court did not give proper weight to the vital elements of the relationship between McKay and Carlen, the partnership, and E. K. Bishop Lumber Company. These elements are set forth in appellants' brief (Br. 5 to 12). Respondent is his answering brief has ignored many of these elements and has relied primarily on the inferences drawn by the Tax Court from the evidence. The court's findings upon which the ultimate finding is based, that the appellants are not entitled to the provisions of Section 117(k)(1) of the Internal Revenue Code, are at variance with the uncontradicted testimony of the witnesses and are clearly erroneous.

B. ULTIMATE FINDING OF FACT AND CONCLUSION OF LAW UNSUPPORTED BY EVIDENCE.

1. The Tax Court Disregarded Uncontradicted Testimony.

Oral testimony was proper to assist in the interpretation of the contract between Neuskah (later Bishop) and to clearly reflect the understanding of the parties. *Landa v. Commissioner*, 206 F.(2d) 431, 432 (D.C. Cir. 1953).

The Tax Court must accept the reasonable, sworn, unimpeached and uncontradicted testimony of a witness. *Foran v. Commissioner*, 165 F.(2d) 705 (5 Cir. 1938); *Grace Bros. Inc. v. Commissioner*, 173 F.(2d) 170, 174 (9 Cir. 1949). None of the recognized exceptions to the rule, such as where the testimony is inherently contradictory or improbable due to omissions or vague and evasive answers, are present in this case. Both McKay, one of the parties, and Aiken, a certified public accountant, testified on both direct and cross examination in a manner which was patently clear, forthright and complete. The Tax Court's failure to accept their unimpeached testimony and to give proper weight to the documentary evidence resulted in findings which were clearly erroneous within the meaning of Rule 52(a) Federal Rules of Civil Procedure.

The Supreme Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) stated that a finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm con-

viction that a mistake has been made. The Tax Court made numerous errors in the findings as set forth in appellants' original brief.

2. The Tax Court Drew Erroneous Inferences From Undisputed Facts.

This court in *McGah v. Commissioner*, 210 F.(2d) 769, 771 (9 Cir. 1954) considered a case similar in principal to the instant one. There the ultimate fact in question was whether the taxpayer held dwelling houses for sale in the ordinary course of business or held them for investment purposes. This court, after stating that a consideration of the entire evidence left it with the firm conviction that a mistake had been made, reversed the Tax Court finding that the houses were held primarily for sale in the ordinary course of business, and reversed the decision of the Tax Court without remand. This court stated at 210 F.(2d) 771:

> "While giving careful consideration to the finding of the Tax Court, we draw our own inferences from undisputed facts."

The case subject of this appeal is one in which all facts are undisputed except the ultimate fact. The respondent in his brief concedes that the facts are "virtually undisputed" (Br. 11). The only fact in question is the ultimate fact whether the partnership of McKay and Carlen had a contract right to cut timber and to sell the logs produced therefrom for their own account. The undisputed facts concerning risk of loss, road building, invoicing, cash discounts, purchases and sales journal entries, explanation of reservation of title, taken together with the principal contract entered

into between the partnership and Neuskah (later Bishop) (Exhibit No. 2, Tr. 16) clearly show that the finding of the ultimate fact by the Tax Court was grossly erroneous and its conclusion of law was in error.

C. CONCLUSION

Since the findings of fact of the Tax Court are clearly not supported by the evidence and the conclusion of law that the appellants are not entitled to the provisions of Section 117(k)(1) is erroneous, the decision should be reversed.

Respectfully submitted,

CHARLES F. OSBORN,
LESTER F. PARKER,
Attorneys for Appellants.

No. 14091

United States
Court of Appeals
for the Ninth Circuit.

PEDRO DIAZ-MONTERO,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-20-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Western District of Washington, Northern Division

No. 3208

PEDRO DIAZ-MONTERO,

Petitioner,

vs.

JAMES P. McGRANERY, Attorney General of the United States,

Respondent.

PETITION

Comes Now the petitioner, Pedro Diaz-Montero, and petitioning the Honorable Court for relief against the respondent, alleges as follows:

I.

That the petitioner is a resident of Seattle, King County, Washington, within the Western District of Washington, Northern Division, and brings this action under the "Declaratory Judgment Act," 28 U.S.C.A. Sec. 2201.

II.

That the respondent is the duly appointed, acting and qualified Attorney General of the United States with official residence in Washington, D. C.

III.

That the petitioner is forty-seven years of age, single and a citizen of Mexico, and last entered the United States at El Paso, Texas, on June 29, 1943,

at which time he was legally admitted as an agricultural contract laborer and that the petitioner has resided in the United States continuously since that time.

IV.

That in August of 1951, the petitioner was accused by the defendant, through the immigration officers at the Port of Seattle, of having had an adulterous relationship with an American citizen. That said relationship was admitted by the petitioner but that petitioner appealed to the respondent for a suspension of deportation under Title 8, Sec. 155 c., providing for suspension of deportation for an alien who has resided continuously in the United States for seven years or more, and that said application for suspension of deportation was appealed to the Commissioner of Immigration who ordered the petitioner deported from the United States on the warrant of arrest issued by the Immigration Service, and that thereafter such decision of the Commisisoner was affirmed by the Board of Immigration Appeals but that in its opinion the Board of Immigration Appeals found that "except for this affair the alien's character and reputation appears to be excellent. We do not believe that this single lapse should preclude us from making a finding of good moral character."

V.

That in spite of the finding of good moral character made by the Board of Immigration Appeals in the manner set forth above said Board neverthe-

less refused to grant the petitioner the privilege of suspension of deportation and authorized voluntary departure, but, provided that in the event the petitioner does not depart from the United States the order of deportation should be reinstated and executed.

VI.

That by reason of the premises and by reason of the fact that the petitioner has been specifically found to be a person of good moral character and by reason of the further fact that he has undisputedly resided in the United States for seven years and more and was so residing upon the effective date of the Act, the petitioner is entitled to have his deportation suspended, and that the act of the defendant in refusing to suspend the petitioner's deportation and in giving no reasons for its order is arbitrary and unfair, and that petitioner has been denied substantial justice by reason of the same and that the respondent has abused his discretion and that petitioner is entitled to a judgment and decree herein, suspending his deportation, or in the alternative, the respondent should be by the court ordered and directed to suspend the petitioner's deportation or accord him a fair hearing upon the same and that petitioner has no other remedy except this action.

Wherefore, petitioner prays for judgment, suspending his deportation, or in the alternative, that the respondent be required to suspend petitioner's deportation or accord him a further hearing upon the same and to deal otherwise justly and fairly with the petitioner, and petitioner further prays for

such other relief as may be just and fair in the premises.

EDWARDS E. MERGES,
ROY E. JACKSON,

/s/ EDWARDS E. MERGES,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed September 22, 1952.

[Title of District Court and Cause.]

ANSWER

For answer to the petition herein the respondent states:

First Defense

The court does not have jurisdiction over the person of the defendant, James P. McGranery, Attorney General of the United States, who resides in Washington, D. C.

Second Defense

The petition fails to state a claim upon which relief can be granted.

Third Defense

Answering the numbered paragraphs of the petition respondent states:

The allegations of paragraphs I, II, III, IV and V are admitted.

The allegations of paragraph VI are denied.

For further answer the respondent states:

I.

The petitioner last entered the United States at the port of El Paso, Texas, on June 29, 1943, and was admitted temporarily as an agricultural contract laborer for one year. The petitioner abandoned his contract employment during October, 1943, and has since resided in the United States. A warrant of arrest was issued by the District Director, Immigration and Naturalization Service, Seattle, January 9, 1951, alleging that the petitioner was deportable in that he failed to depart from the United States in accordance with the terms of his admission.

II.

A deportation hearing was accorded the petitioner November 30, 1951, at Seattle, at which time he was represented by counsel. During the course of said hearing the petitioner admitted that he was deportable under the immigration laws but applied for suspension of deportation under the provisions of Section 19(c)(2) of the Immigration Act of 1917, as amended (8 U.S.C. 155(c)). Evidence was taken with respect to his eligibility for such discretionary relief.

III.

On December 7, 1951, the hearing officer recommended that suspension of deportation be denied and further ordered that the alien be deported from the United States pursuant to law. The petitioner appealed to the Commissioner, Immigration and Naturalization Service, and on February 21, 1952, the Commissioner adopted the findings of the hear-

ing officer, stating that as a matter of administrative discretion, the facts and circumstances in his case do not warrant the exercise of any discretionary relief and ordered that the petitioner be deported.

IV.

The petitioner appealed from the decision of the Commissioner to the Board of Immigration Appeals and on May 1, 1952, the Board of Immigration Appeals, exercising the discretion vested in the Attorney General by law, denied the application for suspension of deportation and, in the alternative, exercised the discretion of the Attorney General by authorizing voluntary departure for the petitioner within the period of sixty days. The Board further ordered that in the event the petitioner did not depart from the United States within sixty days that the order of deportation be reinstated.

V.

A petition for reconsideration was directed to the Board of Immigration Appeals by the petitioner July 7, 1952. On August 11, 1952, the Board denied the motion to reconsider.

Wherefore it is prayed that petition for a declaratory judgment and other relief be denied.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

Service of copy acknowledged.

[Endorsed]: Filed November 12, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant and moves the court to dismiss the petition herein in that the court does not have jurisdiction to review an order of deportation in an action for a declaratory judgment under 28 U.S.C.A., Section 2201.

Heikkela v. Barber
345 U.S. 1 (March 16, 1953).

Respectfully submitted,

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed March 25, 1953.

[Title of District Court and Cause.]

STIPULATION FOR CHANGE OF RESPONDENT

By reason of the fact that the respondent James P. McGranery, has been replaced as Attorney General by Herbert Brownell, it is Hereby Agreed and Stipulated by and between the attorneys for the

petitioner and the respondent hereto that an order be entered substituting Herbert Brownell as Attorney General for James P. McGranery, former Attorney General.

/s/ EDWARDS E. MERGES,
Attorney for Petitioner.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

ORDER

This Matter having come on regularly to be heard before the undersigned Judge of the above-entitled court and it appearing to the Court from the above stipulation that the respondent, James P. McGranery, is no longer Attorney General, and that Herbert Brownell is now the duly appointed Attorney General and that he should be substituted as respondent in the above-entitled cause by reason of such appointment, now, therefore, it is hereby

Ordered, Adjudged and Decreed that Herbert Brownell be and he hereby is substituted as respondent in the above-entitled cause and that all pleadings hereinafter filed herein shall bear his name as respondent, and that in all other ways the status of said cause shall remain the same and be unaffected hereby.

Done in Open Court this 4th day of May, 1953.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ EDWARDS E. MERGES,
Attorney for Petitioner.

Approved as to form and entry:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed May 4, 1953.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3208

PEDRO DIAZ-MONTERO,

Petitioner,

vs.

HERBERT BROWNELL, Attorney General of the United States,

Respondent.

ORDER OF DISMISSAL

This Matter having come on regularly to be heard before the undersigned Judge of the above-entitled court upon the motion of the respondent herein to dismiss, and it appearing to the court that the petition herein was filed on or about the 22nd day of September, 1952, and that thereafter the respondent appearing on or about the 10th day of November, 1952, and filed his answer herein; that thereafter in March of 1953, the respondent filed "A Motion to Dismiss" which said motion was argued to the court and the court having listened fully to the arguments of counsel and having considered the matter, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the respondent's motion to dismiss should be and it hereby is granted. It is further

Ordered, Adjudged and Decreed that the above-entitled cause should be and it hereby is dismissed on the ground that the complaint fails to state a claim upon which relief can be granted, and judgment should be and it hereby is rendered in favor

of the respondent and against the petitioner on the authority of Heikkila v. Barber, 345 U.S. 1, S.C.R. Vol. 73, No. 11, p. 603.

Done in Open Court this 3rd day of August, 1953.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

Approved as to form and entry:

/s/ EDWARDS E. MERGES,
Attorney for Petitioner.

[Endorsed]: Filed and entered August 3, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the petitioner, Pedro Diaz-Montero, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal entered herein on the 3rd day of August, 1953, and from each and every other oral decision and ruling made by the District Court during the pendency of the above-entitled cause.

Dated this 21st day of September, 1953.

EDWARDS E. MERGES,
ROY E. JACKSON,

/s/ EDWARDS E. MERGES,
Attorneys for Petitioner.

[Endorsed]: Filed September 21, 1953.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents: That we, Pedro Diaz-Montero, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Illinois, as surety, are held and affirmatively bound unto the United States of America, in the full and just sum of $250.00, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Executed this 28th day of September, 1953.

The condition of this application is such that:

Whereas, on the 3rd day of August, 1953, in the above-entitled cause an order was entered dismissing principal's petition to suspend deportation, and the said principal has appealed to the United States Court of Appeals, Ninth Circuit.

Now, Therefore, if the said Continental Casualty Company shall pay or cause to be paid such costs and charges as may be awarded against the principal by judgment, or in the progress of the action, not exceeding the sum of Two Hundred Fifty and

No/100 Dollars, Then This Obligation to Be Void: otherwise to remain in full force and effect.

PEDRO DIAZ-MONTERO,

By /s/ EDWARDS E. MERGES,
His Attorney.

[Seal] CONTINENTAL CASUALTY COMPANY,

By /s/ W. H. HICKS,
Attorney-in-Fact.

[Endorsed]: Filed September 29, 1953.

[Title of District Court and Cause.]

PETITIONER'S STATEMENT OF POINTS ON APPEAL

The District Court Erred in:

1. Granting the respondent's motion to dismiss the petitioner's petition.

2. Ordering that the petition be dismissed on the ground that the petition failed to state a claim upon which relief could be granted.

3. Rendering judgment in favor of the respondent and against the petitioner.

4. Rendering judgment in favor of the respondent and against the petitioner on a basis of the

allegations appearing in the petition without having heard the evidence in support thereof.

EDWARDS E. MERGES,
ROY E. JACKSON,
/s/ EDWARDS E. MERGES,
Attorneys for Petitioner.

[Endorsed]: Filed September 29, 1953.

[Title of District Court and Cause.]

STIPULATION TRANSFERRING EXHIBITS

It Is Hereby Agreed and Stipulated by and between the parties herein through their respective counsel of record, as follows, to wit:

That the petitioner has filed herein a Notice of Appeal from the Order of Dismissal entered herein on the 3rd day of August, 1953, and has designated the complete record on appeal and that it is necessary in order to complete the record that the original exhibits introduced by the parties be, by order of this court, transferred with the transcript on appeal to the United States Court of Appeals for the Ninth Circuit.

Accordingly, It Is Agreed and Stipulated between the parties that the attached order directing that said original exhibits be transferred by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit be entered forthwith and without notice.

Dated at Seattle, Washington, this 29th day of September, 1953.

EDWARDS E. MERGES,
ROY E. JACKSON,
/s/ EDWARDS E. MERGES,
Attorneys for Petitioner,
Attorneys for Petitioner.
Asst. United States Attorney.

[Endorsed]: Filed September 30, 1953.

[Title of District Court and Cause.]

ORDER TRANSFERRING EXHIBITS

Pursuant to the attached stipulation, It Is Ordered that all original exhibits introduced by either of the parties, or both, be transferred by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit as a part of the transcript on appeal.

Done in Open Court this 30th day of September, 1953.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by.

/s/ EDWARDS E. MERGES,
Attorney for Petitioner.
By MR. BELCHER. W.J.L.

Approved as to form and entry:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed September 30, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original documents and papers in the file dealing with the above-entitled action as the record on appeal herein (no exhibits having been offered or admitted), from the Order of Dismissal filed August 3, 1953, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, said papers being identified as follows:

1. Petition, filed Sept. 22, 1952.
2. Summons with Marshal's Return thereon, filed Sept. 29, 1952.
3. Answer, filed Nov. 12, 1952.
4. Appearance of defendant USA, filed Nov. 12, 1952.
5. Motion to Dismiss, filed Mar. 25, 1953.
6. Notice of hearing above motion, filed Mar. 25, 1953.
7. Stipulation and order for change of respondent, filed May 4, 1953.

8. Memorandum of Authorities, filed May 27, 1953.

9. Notice of hearing Motion to Dismiss, filed June 2, 1953.

10. Petitioner's Memorandum, filed June 17, 1953.

11. Order of Dismissal, filed Aug. 3, 1953.

12. Notice of Appeal, filed Sept. 21, 1953.

13. Bond on Appeal, $250.00, Con. Cas. Co., filed 9-29-53.

14. Petitioner's Statement of Points on Appeal, filed 9-29-53.

15. Designation of Record on appeal, filed Sept. 29, 1953.

16. Stipulation Transferring Exhibits, filed Sept. 30, 1953.

17. Order Transferring Exhibits, filed Sept. 30, 1953.

(Clerk's note—No exhibits were offered or received.)

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal in this cause, to wit:

Notice of Appeal, $5.00,

and that said amount has been paid to me by the attorney for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 9th day of October, 1953.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14091. United States Court of Appeals for the Ninth Circuit. Pedro Diaz-Montero, Appellant, vs. Herbert Brownell, Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 23, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14091

United States Court of Appeals

For the Ninth Circuit

PEDRO DIAZ-MONTERO, *Appellant*,

vs.

HERBERT BROWNELL, Attorney General of the United States, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLANT

EDWARDS E. MERGES,
ROY E. JACKSON,
Attorneys for Appellant.

511 Smith Tower,
eattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 14091

United States Court of Appeals

For the Ninth Circuit

PEDRO DIAZ-MONTERO, *Appellant*,

vs.

HERBERT BROWNELL, Attorney General of the United States, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLANT

EDWARDS E. MERGES,
ROY E. JACKSON,
Attorneys for Appellant.

1511 Smith Tower,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The appellant filed his petition herein under the Declaratory Judgment Act, 28 U.S.C.A. 2201 (See Appendix A) in the United States District Court for the Western District of Washington, Northern Division, on September 22, 1952 (Tr. 6). Final order dismissing appellant's petition was entered on August 3, 1953 (Tr. 12 and 13). Notice of appeal was filed September 21, 1953 (Tr. 13) and cost bond September 29, 1953 (Tr. 14).

The order of dismissal entered herein is final and appealable. *Sardo v. McGrath*, 196 F.2d 20 (D.C.)

Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by Sec. 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

STATEMENT OF THE CASE

Suit was brought in the District Court by the appellant under the Declaratory Judgment Act, 28 U.S. C.A. 2201 for judgment of the District Court, suspending his deportation from the United States, or in the alternative, requiring the appellee to suspend appellant's deportation, or accord him a further hearing upon the same. The petition also contained a prayer for general relief. The petition was dismissed *prior to hearing* on motion of the appellee, and the only question presented is the sufficiency of the petition to entitle the appellant to a *hearing* on the question of the relief prayed for under the Declaratory Judgment Act. *The sole ground for dismissal is that appellants sole remedy is by habeas corpus.*

The background of this case is undisputed and is the following:

The appellant, an unmarried man and a citizen of Mexico, was legally admitted to the United States on June 29, 1943, as an agricultural contract laborer and has since that time resided here continuously. In August of 1951, the appellant was ordered deported by the immigration service at Seattle, Washington, because of the fact that he had admitted having committed adultery with an American citizen. The appellant thereupon appealed to the respondent for suspension of deportation under U.S.C.A. Title 8, Sec. 155c (See Appendix B) which provides for suspension of deportation of an alien of good moral character who has resided continuously in the United States for seven years or more. Upon the appellant's appeal to the Board of Immigration Appeals, the

Board found *specifically* that the appellant was a person of good moral character and had resided in the United States seven years, and *suspended* the order or warrant of deportation but not in accordance with U.S.C.A. Title 8, Sec. 155c, and instead held that the appellant should depart from the United States within a time certain or the warrant would be reinstated. The appellant thereupon filed his petition herein, alleging in some detail the foregoing facts (Tr. 3-6). On November 12, 1952, the appellee filed an answer, setting up three defenses, namely (1) lack of jurisdiction of the District Court over the Attorney General; (2) failure of the petition to state a claim upon which relief can be granted; and (3) a series of allegations admitting and restating in further detail the facts stated in the petition (Tr. 6-8). On March 25, 1953, the appellee filed a motion to dismiss on the sole ground of *Heikkela v. Barber*, 345 U.S. 1, 73 S. Ct. 603 (Tr. 9). On August 3, 1953, the court granted the appellee's motion to dismiss without hearing evidence and granted final judgment of dismissal in favor of the appellee and against the appellant, on the sole ground of *Heikkela v. Barber*, *supra* (Tr. 12 and 13). This appeal results.

SPECIFICATION OF ERRORS

The District Court erred in:

1. Granting the appellee's motion to dismiss and in dismissing the petition filed herein without hearing the evidence.

2. Rendering judgment in favor of the appellee and against the appellant.

3. Holding that the appellant was not entitled to relief under the Declaratory Judgment Act and that his sole remedy was by habeas corpus.

4. Holding that the case of *Heikkela v. Barber*, *supra*, was controlling and basing his order of dismissal on that case.

SUMMARY OF ARGUMENT

The *Heikkela* case, *supra*, which formed the sole legal basis for the order of dismissal appealed from (according to the terms of the order itself) is not in point as will be demonstrated by analysis. The appellant is entitled to relief under the specific provisions in the Declaratory Judgment Act, 28 U.S.C.A., Sec. 2201, and under the doctrine announced by the Supreme Court in the case of *McGrath v. Kristensen*, 340 U.S. 162, 71 S.Ct. 224. Pertinent sections of statutes cited are set forth in appendices hereto.

ARGUMENT

The facts stated in the petition are not disputed. These should be considered at the very outset in connection with a reading of the Declaratory Judgment Act (Appendix A). Since all assignments of error relate to substantially the same thing they will be discussed under one heading.

The appellee states that this case is controlled by *Heikkela, supra.* Let us analyse it: Heikkela, *who then had an order of deportation outstanding against him,* brought an action in the District Court for the Northern District of California, seeking "review of agency action" which had resulted in issuance of a

deportation order *then in force.* The question presented was whether such *outstanding* order could be attacked by any means other than habeas corpus. The Supreme Court held that *outstanding* deportation orders could be reviewed only by habeas corpus. *Heikkela had made no application for suspension of deportation* as has the appellant in the instant case, and Heikkela's attack was directly upon the order of deportation, and *not* upon the refusal of the Attorney General to suspend deportation. Nor had the Attorney General, or the Board of Special Inquiry suspended the order of deportation and granted voluntary departure in the *Heikkela* case as it has in the instant case.

Therefore, there are two important distinctions between Heikkela and the appellant. (1) Heikkela had an order of deportation *outstanding* against him and had sought to attack such *order*, and (2) Heikkela made no application for suspension and the validity of the Attorney General's refusal to consider suspension of deportation was *not* an issue as it *is* here.

The case of *McGrath v. Kristensen, supra,* is controlling here, and the facts of that case are briefly the following:

Kristensen, an alien, was legally admitted to the United States but violated his visitor's rights and was ordered deported. Just as in the instant case, Kristensen made application for suspension of his deportation under 8 U.S.C.A., Sec. 155c. The Attorney General refused to suspend deportation and suit was brought under the Declaratory Judgment Act, *supra,* just as in the instant case. The Supreme Court, in

its opinion, clearly stated the question involved when it said, at page 229:

> *"However, the Government does contend that the Immigration Act provision, Sec. 19(a), making the Attorney General's decision on deportation 'final' precludes judicial review except by habeas corpus of his refusal to grant suspension of deportation. The procedural question as thus narrowed is whether an administrative decision against a requested suspension of deportation under Sec. 19(c) of the Immigration Act can be challenged by an alien free from custody through a declaratory judgment or whether, to secure redress, he must await the traditional remedy of habeas corpus after his arrest for deportation."* (Italics ours)

In determining that it had jurisdiction to review the refusal of the Attorney General to suspend deportation, the court said:

> *"This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts,* 28 U.S.C., Sec. 1331, 28 U.S.C.A., Sec. 1331, and the terms of the Declaratory Judgment Act, 28 U.S.C., Sec. 2201, 28 U.S.C.A., Sec. 2201." (Italics ours)

So in the instant case there is an actual controversy between the alien and the immigration officials over the legal right of the alien to be considered for suspension. The appellant was held by the appellee to be a person of good moral character when he said, "We do not believe that this single lapse (when appellant

committed adultery) should preclude us from making a finding of good moral character." That the appellant had lived continuously in the United States for more than seven years was also conceded (Tr. 3 and 4). The appellant was therefore eligible under law for suspension of deportation, but the appellee refused to consider the petition for suspension and gave no reason for his order *in spite of the fact that the appellee made specific findings which would entitle the appellant to suspension* in the absence of other factors. No such factors appear. No reasons were given. It is, therefore, apparent that the appellee has refused to consider the appellant's application *on its merits*, just as did the immigration authorities in the *Kristensen* case and accordingly, this cause comes squarely under that case.

In concluding, it is interesting to note that the court in Heikkela, took pains to distinguish Kristensen when it said:

> "Heikkela suggests that *Perkins v. Elg*, 1939, 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320 (declaratory and injunctive relief), and *McGrath v. Kristensen*, 1950, 340 U.S. 162, 71 S.Ct. 224, 95 L.Ed. 173 (declaratory relief), were deviations from this rule. But neither of those cases involved an outstanding deportation order. Both Elg and Kristensen litigated erroneous determinations of their status, in one case citizenship, in the other eligibility for citizenship. Elg's right to a judicial hearing on her claim of citizenship had been recognized as early as 1922 in *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492, 66 L. Ed. 938. And Kristensen's ineligility for naturalization was set up in contesting the Attorney

General's refusal to suspend deportation proceedings under the special provisions of Sec 19(c) of the 1917 Immigration Act, as amended 8 U.S.C.A., Sec. 155(c). *Heikkela's status as an alien is not disputed and the relief he wants is against an outstanding deportation order. He has not brought himself within Elg or Kristensen.'* (Italics ours)

SUMMARY AND CONCLUSION

It is apparent from the petition and the law in such cases that the appellant here is entitled to a hearing upon the question of his right to be considered for suspension, and that the immigration officials' refusal to suspend deportation in view of *their own findings* is, in fact, a refusal to consider suspension just as in the *Kristensen* case, and constitutes an arbitrary and unfair disposition of the appellant's rights under 8 U.S.C.A. Sec. 155c, and the appellant is therefore entitled to relief under the Declaratory Judgment Act, *supra* and to a hearing upon his petition. The petition, therefore, should not have been dismissed, and this case should be remanded to the District Court for hearing upon the petition. *Kristensen v. McGrath, supra.* U. S. Court of Appeals Opinion, 179 F.2d 796; *Sardo v. McGrath, supra.*

Respectfully submitted,

EDWARDS E. MERGES,
ROY E. JACKSON,
Attorneys for Appellant

APPENDIX A

Title 28, Sec. 2201. Creation of remedy:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shal be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, Sec. 111, 63 Stat. 105.

Sec. 2202. Further relief:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

APPENDIX B

Title 8, U.S.C.A., Sec. 155(c), as amended by Public Law 863—80th Congress, Chapter 783-2d Session.

AN ACT

To amend subsection (c) of section 19 of the Immigration Act of 1917, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 19 of the Immigration Act of February 5, 1917, as amended (54 Stat. 671; 56 Stat. 1044; 8 U.S.C. 155(c), is further amended to read as follows:

"(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * *"

Approved July 1, 1948.

Note: Since Public Law 414-82d Congress, Chap. 477-2d Session, above provision appears in substance under U.S.C.A. Title 8 §1254.

No. 14091

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEDRO DIAZ-MONTERO

Appellant

VS.

HERBERT BROWNELL, Attorney General of the United States of America

Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

Office and Post Office Address:
1012 United States Court House
Seattle 4, Washington

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No. 14091

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No. 14091

IN THE

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PEDRO DIAZ-MONTERO

Appellant

vs.

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Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by Title 28 Section 2241, and upon this court by the provisions of Title 28 Section 2253 U.S.C. only.

STATEMENT

This is an appeal from a judgment of dismissal of an action against the Attorney General of the United States under the Declaratory Judgment Act (28 U.S.C.A. Sec. 2201), praying for declaratory relief by suspending the appellant's deportation or, in the alternative, for an order requiring the appellee Attorney General to suspend deportation or to accord appellant a further hearing on the same. The appellee by answer and a motion to dismiss challenged the complaint on the following grounds:

1. By motion to dismiss, alleging that the court did not have jurisdiction to review an order of deportation in an action for a declatory judgment.

2. By way of the first defense in the answer, that the court did not have jurisdiction over the person of the Attorney General of the United States who resides in Washington, D. C.

3. That the petition failed to state a claim upon which relief could be granted.

Upon the trial the following facts were admitted: That the appellant is 47 years of age, single, a citizen of Mexico who last entered the United States at El Paso, Texas, as an agricultural laborer and was admitted for one year on June 29, 1943. He abandoned

his contract employment four months later (October 1943). A warrant of arrest was issued January 9, 1951, alleging that appellant was deportable in that he failed to depart from the United States in accordance with the terms of his admission. (R7)

A deportation hearing was accorded appellant November 30, 1951 at Seattle, Washington, at which time he was represented by counsel. At that hearing he admitted he was deportable under the Immigration laws but applied for suspension of deportation under the provisions of Section 19(c) (2) of the Immigration Act of 1917, as amended (8 U.S.C. 155(c)) *Evidence was taken with respect to his eligibility for such discretionary relief.* On December 7, 1951 the hearing officer recommended that suspension of deportation be denied and further ordered that appellant be deported from the United States pursuant to law. This decision was appealed to the Commissioner, Immigration and Naturalization Service, Washington, D. C., who on February 21, 1952 concurred in the Hearing Officer's decision and ordered the appellant deported; that on May 1, 1952 the Board of Immigration Appeals, upon review, affirmed the Commissioner's decision as to deportability, found appellant eligible under the statute to be considered for discretionary relief, and granted him the privilege of voluntary

departure but *denied him the privilege of suspension of deportation.* In granting voluntary departure in lieu of deportation, the Board of Immigration Appeals further provided that in the event the appellant did not depart from the United States within sixty days (or by July 1, 1952) the order of deportation would be reinstated and executed; that appellant did not depart within a sixty-day period and thereafter brought this action September 23, 1952, at a time when there *was* an outstanding order of deportation (the order being re-instated) charging that the refusal to grant suspension of deportation by the Attorney General was arbitrary and unfair; that the Attorney General abused his discretion; and that the Attorney General should be directed by the district court to suspend the appellant's deportation or to accord him a fair hearing upon the same. He had such a hearing and suspension was denied. The denial was affirmed by the Commissioner and the Board of Immigration Appeals.

The district court, after argument granted appellee's motion to dismiss, and thereafter entered its formal order (R.13) on the 13th day of August 1953.

Notice of appeal was filed September 21, 1953 (R.13)

APPLICABLE STATUTE

8 U. S. C. 155(c):

> "In the case of any alien . . . who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien * * * if he finds * * * that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

The pertinent provisions of the Code of Federal Regulations authorizing the Board of Immigration Appeals to exercise the statutory discretion of the Attorney General under 8 U. S. C. 155 reads, in part, as follows:

> 8 C. F. R., Part 90 Effective May 24, 1952; Published F. R. 4737, May 24, 1952
>
> "90.2 *Organization.* There shall be in the office of the Attorney General a Board of Immigration Appeals. It shall be under the supervision and direction of the Attorney General and shall be responsible solely to him * * *
>
> "90.3 *Jurisdiction, powers, and finality of decisions.* (a) When the Commissioner, or other officers of the Immigration and Naturalization Service designated by the provisions of this chapter, exercise the power and authority of the Attorney General delegated to them by provisions of this chapter by entering orders in proceedings under the immigration, nationality, or

other laws administered by the Service, such orders shall be final except that appeals shall lie to the Board from the following . . . (2) The Decisions of Hearing Officers in deportation proceedings as provided in parts 151 and 152 of this chapter; . . . (d) in considering and determining such appeals or certifications, the Board shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case subject to any specific limitation prescribed by this chapter. The decision of the Board shall be in writing and shall be final except in those cases reviewed by the Attorney General in accordance with 90.7." *(Provisions of 90.7 not applicable herein.)*

The sole question here is can the relief sought be had under the declaratory judgment act, or is the remedy by habeas corpus?

The District Court held that habeas corpus was the sole remedy.

ARGUMENT

Jurisdiction Over Subject Matter

The District Court did not have jurisdiction to review an order of deportation by way of an action for a declaratory judgment.

Heikkila v. Barber et al., 345 U. S. 1, (March 16, 1953.)

The Supreme Court in that case was called upon to review a decision of a three-judge court in the

Northern District of California, dismissing the complaint of Heikkila who sought to set aside an order of deportation by seeking review of agency action as well as injuctive and declaratory relief. The court held that *a deportation order could only be attacked by habeas corpus* and that *Perkins v. Elg* and *McGrath v. Kristensen*, infra, were not deviations from this rule, further that the rule applied to actions brought under the Declaratory Judgment Act, as in the instant case, as well as to relief sought under the Administrative Procedure Act Mr. Justice Clark speaking for the court said:

> "Heikkila suggests that *Perkins v. Elg*, 1939, 307 U. S. 325, 59 S. Ct. 884, 83 L. Ed. 1320 (declaratory and injunctive relief), and *McGrath v. Kristensen*, 1950, 340 U. S. 162, 71 S. Ct. 224, 95 L. Ed. 173 (declaratory relief), were deviations from this rule. But *neither of those cases involved an outstanding deportation order.* Both Elg and Kristensen litigated erroneous determinations of their status, in one case citizenship, in the other eligibility for citizenship. Elg's right to a judicial hearing on her claim of citizenship had been recognized as early as 1922 in *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938. And Kristensen's ineligibility for naturalization was set up in contesting the Attorney General's refusal to suspend deportation proceedings under the special provisions of Sec. 19(c) of the 1917 Immigration Act, as amended, 8 U. S. C. A. Sec. 115(c). Heikkila's status as an alien is not disputed and the relief he wants is against an outstanding deportation order. He has not brought himself within Elg or Kristensen.

"Appellant's Administrative Procedure Act argument in his strongest one. The reasons which take his case out of Sec. 10 apply *a fortiori* to arguments based on the general equity powers of the federal courts and the Declaratory Judgments Act. 28 U. S. C. Sec. 2201. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 1950, 339 U. S. 667, 671-672, 70 S. Ct. 876, 878, 879, 94 L. Ed. 1194. Because we decide the judgment below must be affirmed on this procedural ground, we do not reach the other questions briefed and argued by the parties.

"The rule which we reaffirm recognizes the legislative power to prescribe applicable procedures for those who would contest deportation orders. Congress may well have thought that habeas corpus, despite its apparent inconvenience to the alien, should be the exclusive remedy in these cases in order to minimise opportunities for repetitious litigation and consequent delays as well as to avoid possible venue difficulties connected with any other type of action. [13]We are advised that the Government has recommended legislation which would permit what Heikkila has tried here. But the choice is not ours."

Like Heikkila, this case does not come within the rule in *McGrath v. Kristensen*, 340 U. S. 162 as in that case construction of a statute was involved to determine if he was eligible for citizenship. There, the Attorney General would not exercise discretionary power because it was found that Kristensen was "ineligible for citizenship" and precluded by statute from consideration. Here the complainant admits that dis-

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[13] See *Paolo v. Garfinkel*, 3 Cir., 200 F. (2d) 280.

cretion was exercised, because appellant was found to be eligible for voluntary departure and such relief was actually granted. The statute, 8 U. S. C. A. 155(c), authorizes the Attorney General to grant voluntary departure or suspension of deportation *in* his his discretion.

Just three days before the Supreme Court decided the Heikkila case, Judge Yankwich of the District Court of California for the southern division on March 13, 1953 in the case of *Corona v. Landon*, 111 F. Supp. 191 at 193, 196 held that *orders of deportation could be reviewed only in habeas corpus proceedings*. Judge Yankwich further pointed out, p. 196, that a petition for review could not be turned into a habeas corpus proceeding where the defendant was not in custody, citing *Medalha v. Shaughnessy*, 102 F. Supp. 950.

Jurisdiction Over The Person

The district court did not have jurisdiction over the person of the Attorney General because of the insufficiency of service of process.

Rule 4(d) (5) and 4(f), Federal Rules of Civil Procedure citing:

Eng Kam v. McGrath, 10 Fed. Rules Decision 135 (D. C. W. D. Washington, 1950)

Burns v. Commissioner, Immigration and Naturalization, 103 F. Supp. 180.

Connor v. Miller, 178 F. (2d) 755.

Paolo v. Garfinkel, 200 F. (2d) 280.

Corona v. Landon, 111 F. Supp. 191.

c. f. *Heikkila v. Barber* quoted p. 4, line 30 where the Supreme Court refers to the venue difficulties in this type of action citing *Paolo v. Garfinkel* (supra).

The certified return of service in this action shows that the defendant Attorney General was served by registered mail on September 23, 1952 by mailing two copies of the summons and petition.

FAILURE TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED

The petition fails to state a claim upon which relief can be granted.

The petition herein, (R.3) on its face, shows that the appellant was granted voluntary departure, a form of discretionary relief provided under 8 U. S. C. 155(c), therefore, no question can be raised as to an *arbitrary denial of discretionary relief* under the statute. Judicial review of the Attorney General's statutory power to allow voluntary departure or suspension of deportation is narrowly restricted.

Weedeke v. Watkins, 166 F. (2d) 369.

Judge Learned Hand in *Kaloudis v. Shaughnessy*, 180 F. (2d) 489, January 30, 1950, described the discretionary power of the Attorney General as follows:

> "The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which the courts have no review unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. It is by no means true that 'due process of law' inevitably involves an eventual resort to courts, no matter what may be the subject at stake; not every governmental action is subject to review by judges."

This case does not present the situation where there has been refusal to exercise discretionary relief. The only complaint here is that the Board refused to exercise discretion in a certain manner, by suspending deportation. No facts are set out in the complaint which affirmatively allege a refusal to exercise discretion or a clear abuse of discretion. True, appellant alleges that the action taken by the Attorney General was arbitrary but here what the appellant claims is an arbitrary exercise of discretion was actually a decision in the appellant's favor in *allowing him to depart from the United States without having the stigma of deportation upon his record*, thus preventing his return to the United States. How can it be

said that a privilege granted to an alien who has no right to remain in the United States whatsoever can be arbitrary? The statute clearly gives the Attorney General discretion to grant voluntary departure or, in his discretion, to grant suspension of deportation. "The Attorney General may (1) permit such alien to depart from the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien."

No judicial authority has been found where a court has held the action of the Attorney General to be arbitrary when relief from deportation has been accorded the alien. The order providing a time limit within which departure must be accomplished has been upheld by the Second Circuit in

> *United States ex rel Bartsch v. Watkins*, 175 F. (2d) 245.

There the alien contended that the Board of Immigration Appeals erred in denying his motion for an extension of the ninety-day period granted him for voluntary departure and the court stated:

> "Whether or not a deportable alien shall be granted the privilege of voluntary departure lies in the discretion of the Immigration authorities. 8 U. S. C. 155(c). Since they need not grant it at all, they may grant it on condition that it be exercised within a specified time. If they will not extend the time, the courts cannot intervene.

United States v. Reimer, (2d) Cir., 103 F. (2d) 777, 779. c. f. *United States v. Watkins*, (2d) Cir., 167 F. (2d) 279, 282."

The appellant alleges, paragraph VI, page 2 of the complaint, (R.5) that by reason of the fact that the Board found the petitioner to be of good moral character and that he had resided in the United States for seven years, it acted arbitrarily in granting voluntary departure instead of suspension of deportation. This is the only allegation found in the petition as a basis for arbitrary action by the Attorney General. This argument was rejected by the court in

Adell v. Shaughnessy, 183 F. (2d) 371.

"We think that, in the amended section, the good moral character for the preceding five years is a necessary but not a sufficient condition of the granting of relief."

and then the court commented in footnote 5, "Consumption of salt is a necessary condition to a man's survival, but the consumption of salt will not alone suffice as a condition to that survival."

There is nothing in the complaint which would indicate that the Board did not take into consideration other factors in the appellant's record in arriving at its decision.

It is respectfully submitted that the judgment of the district court is correct and should be affirmed.

ANSWER TO APPELLANT'S BRIEF

Counsel in his analysis of the case of *Heikkila v. Barber*, 345 U. S. 1, seeks to distinguish the instant case from that on the basis of an order of deportation *then in force;* and that Heikkila *had made no application for suspension of deportation.*

Here, the decision of the Attorney General did nothing more than temporarily suspend the order of deportation for the period of sixty days on condition that the alien voluntarily depart. When that condition was not met the deportation order was reinstated and was, when this action was commenced on September 23, 1952, *then in force.*

The granting or denying suspension of deportation is *wholly discretionary* on the part of the Attorney General.

Alexiou v. McGrath, (D.C.D.C. 1951) 101 F. Supp. 421.

The rules and regulations of the United States Attorney General providing that a person subject to deportation may apply for discretionary relief in the nature of a voluntary departure, suspension of deportation or pre-examination as to right of re-entry, have the force and effect of law.

Mastrapasqua v. Shaughnessy, (C. A. N. Y. 1950) 180 F. (2d) 999.

Exercise by Board of Immigration Appeals of its discretionary power under this Section (Sec. 155) to suspend deportation is not reviewable by courts, unless there has been a clear abuse of discretion or a clear failure to exercise discretion, and in such case, court can only require that the discretion be exercised.

U. S. ex rel. Adel v. Shaughnessy, 183 F. (2d) 371.

The power of the Attorney General to suspend deportation is a dispensing power like a judge's power to suspend execution of a sentence or the President's to pardon a convict; and it is a matter of grace over which the courts have no review under requirement of due process of law, unless denial has been actuated by considerations that Congress could not have intended to make relevant.

U. S. ex rel. Kaloudis v. Shaughnessy, 180 F. (2d) 489.

At the time this action was commenced appellant had an outstanding deportation warrant against him, because he had not availed himself of the privilege of voluntary departure within the sixty day period allowed which automatically re-instated the deportation order.

It is argued that the case of *McGrath v. Kristensen*, 340 U. S. 162 is controling here.

We have set out in our argument to sustain the judgment herein Mr. Justice Clark's remarks about both the cases of *Perkins v. Elg*, 307 U. S. 325 and *McGrath v. Kristensen*, 340 U. S. 162 in the Heikkila case, supra where it was said:

> "And Kristensen's ineligibility for naturalization was set up in contesting the Attorney General's refusal to suspend deportation proceedings under special provisions of Sec. 19(c) of the 1917 Immigration Act. as amended 8 U.S.C.A. Sec. 115(c). Heikkila's status as an alien is not disputed and the relief he wants is against an outstanding deportation order."

Here, appellant's status as an alien is admitted, and the relief *he* wants is against an outstanding deportation order.

CONCLUSION

It is respectfully submitted that the decision of the district court is in all things correct and should be affirmed.

Respectfully submitted,

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No. 14,096

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Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

This is an appeal from an order of the Court of the United States District in and for the Northern District of California, Southern Division, dismissing a writ of habeas corpus, filed on behalf of Ng Yip Yee, the detained, and directed against Bruce Barber, District Director of the Immigration and Naturalization Service, San Francisco, California.

The detained is a citizen of the United States, and the natural and legal son of Ng Ah Shaw, who was

born in Seattle, Washington, on 6 September 1886, a citizen of the United States.

The detained made his application before the United States Consul in Canton in the year 1949, for recognition of his United States citizenship, and after investigation by the United States Consul and the Secretary of State, the Passport Division of the State Department, Washington, D.C., recognized the claim of Ng Yip Yee to United States citizenship, and the American Consul at Hong Kong, B.C., was directed to issue, and did issue, a valid passport to Ng Yip Yee on or about about the 1st day of July, 1952.

The detained, Ng Yip Yee, arrived at the Port of San Francisco, on the 27th day of April, 1953, and thereafter the said Ng Yip Yee was unduly detained by the appellee and was refused admittance into the United States. The detained was held incommunicado by the appellee for a period of about several weeks, and upon the filing of a writ of habeas corpus, and administrative proceeding was commenced by the Department of Immigration, on the basis that the detained was an alien, and the passport was taken from the possession of Ng Yip Yee and was thereupon declared invalid.

The detained was not formally charged but was put upon the task of establishing evidence and proving beyond a reasonable doubt his status of citizenship, in a hearing which was objected to by counsel for the detained as being without jurisdiction to hear the matter. Further, the detained was deprived of his

passport and the rights of citizenship, without the due process of a hearing or a trial, and was considered by the Immigration and Naturalization Service as an alien without the United States and has never been informed of reasons for invalidation of his passport.

SPECIFICATION OF ERRORS.

1. THE COURT BELOW ERRED IN DISMISSING THE APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS.

Ng Yip Yee was examined and investigated by the Department of State and the United States Consul at Canton and Hong Kong in regard to Ng Yip Yee's claim to United States citizenship.

Ng Yip Yee was required to sustain the burden of proof in establishing this claim to citizenship, and at the instance of the State Department a blood test was submitted to by the applicant and his parent.

Ng Yip Yee further gave testimony and submitted documentary evidence in support of his claim, and thereafter was deemed to have sustained said burden of proof and was thereupon issued by the Consul at Hong Kong, upon instruction by the Passport Division of the Department of State, a valid passport, the partial contents of which are herein set forth from page 2 of Passport of United States, No. 364:

> "I, the undersigned *(Consul)* of the United States of America, hereby request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and

protection to *Ng Yip Yee,* a citizen of the United States."

Ng Yip Yee, having sustained the burden of proof, thereby comes within the meaning and mandate of 22 Code Federal Regulations, sec. 107.3(a), pertinent to the duties of Foreign Service Officers and herein quoted:

> "(a) Accept applications for service passports and, when designated to do so by the Secretary of State under authority contained in the act of July 3, 1926, 44 Stat. 887 (22 U.S.C. 211a), grant and issue such passports to American nationals who owe allegiance to the United States in accordance with the provisions of the laws of the United States, with such provisions of Executive Order No. 7856 of March 31, 1938, entitled 'Rules Governing the Granting and Issuing of Passports in the United States' (3 F.R. 799) as may be applicable to the issuance of passports abroad, and with such administrative regulations as may be prescribed by the Secretary of State."

and was recognized as a citizen of the United States by the Consul, who issued a valid passport in accordance and compliance with the regulation hereinabove quoted.

Ng Yip Yee having been issued a valid passport was for all purposes a citizen of the United States, free to travel to the United States and join his family.

The Court held in *U. S. v. Browder,* 113 F. 2d 97:

> "A passport certifies that the *person therein described is a citizen of the United States* and

> requests for him while abroad, permission to come and go as well as lawful aid and protection, and is a document which from its nature and object is addressed to foreign powers." (Italics ours.)

Therefore, it is the contention of the appellant that the issuance and possession of a passport by the detained constituted Ng Yip Yee a citizen of the United States. Although the passport of Ng Yip Yee was taken by the Immigration and Naturalization Service upon grounds that it was invalidated by the Secretary of State, Ng Yip Yee could not be considered as having lost his citizenship.

The Court held in *Gillars v. United States,* 182 F. 2d 962:

> "In any event, the revocation of a passport, nothing more appearing, does not cause a loss of citizenship or dissolve the obligation of allegiance issuing from citizenship."

The Court continuing:

> "A passport is some though not conclusive evidence of citizenship."
>
> "It is a valuable and useful documentation, particularly as an aid to travel and as an identification in foreign lands, *but the absence or revocation of a passport does not deprive an American of citizenship."* (Italics ours.)

The status of citizenship of Ng Yip Yee was determined with formality, evidence, testimony and witnesses, and findings were made by the Secretary of

State and confirmed by the American Consul at Hong Kong that Ng Yip Yee was a citizen and entitled to a United States passport, and as a citizen of the United States the Court below erred in dismissing the appellant's petition for a writ of habeas corpus.

---

2. THE COURT ERRED IN HOLDING THAT NG YIP YEE WAS SUBJECT TO AN ADMINISTRATIVE HEARING.

The appellee contends that the detained, Ng Yip Yee, is subject to the administrative jurisdiction conferred upon the Attorney General and its agency, the Department of Immigration and Naturalization.

> Transcript (pages 9-12, Sec. 235(b) (8 U.S.C. 1225 (b), Sec. 236(a) (8 U.S.C. 1226 (a), and Sec. 236(b) (8 U.S.C. 1226 (b), of the Immigration and Nationality Act of 1952.

These sections are applicable to aliens who are attempting to enter the United States as such aliens, and therefore are applicable to non-resident aliens, the administrative agency of the Immigration and Naturalization Service, under the Attorney General of the United States, being the proper forum for an alien to give evidence, produce witnesses, and be heard in respect to any claim of grounds for entering the United States.

The detained, Ng Yip Yee, poses a different problem than that upon which the appellee contends in respect to the proper forum for an examination and investigation of detained. The appellant contends that

if for any reason on behalf of the security of the nation, or the interests of justice, an investigation or examination should be required of the detained, Ng Yip Yee, then the proper person and administrative agency to investigate or examine the detained is the Secretary of State and his agencies but not the Attorney General and his agencies.

The jurisdiction to examine and investigate citizens of the United States living without the United States is conferred upon the Secretary of State by Act of Congress:

> *Immigration and Nationality Act,* Public Law 414, Chapter 477, Sec. 104 (a):
>
> "The Secretary of State shall be charged with the administration and the enforcement of the provisions of this act, and all other immigration and nationality laws relating to (1) the powers, duties and function of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas; (2) the powers, duties and functions of the Bureau of Security and Consular Affairs; and (3) *the determination of nationality of a person not in the United States.*" (Italics ours.)

Ng Yip Yee is not in the United States, and therefore if he must be subject to an administrative hearing or an investigation or any proceeding of whatsoever nature, the Secretary of State is the proper forum and the Attorney General is without jurisdiction to entertain the matter or to detain the citizen, Ng Yip Yee.

3. THE COURT ERRED IN REFUSING TO RECOGNIZE THE RIGHTS OF NG YIP YEE AS A CITIZEN OF THE UNITED STATES.

The passport of the detained, Ng Yip Yee, was invalidated and taken from the detained without a trial or hearing. As a citizen, Ng Yip Yee was entitled to be charged and to be given notice that his passport was invalidated and taken from his possession and that the revocation of his passport without a hearing or a trial was the denial of due process, a right inherent to a citizen of the United States by virtue of the Constitution of the United States.

In *Bauer v. Acheson,* Civ. No. 743-52, 106 Fed. Supp. 445, the Court sitting, 3 justices en banc, considered the taking and summary revocation of a passport, where it was held:

> "Secretary of State was without authority to summarily revoke passport, during period for which it was valid, without prior notice or opportunity for hearing, and on valid statement that citizen activities were contrary to best interests of United States, and he was likewise without authority to refuse to renew passport under same circumstances."

In discussing the question further, the Court in reference to taking a passport without a hearing or notice, stated with reference to 22 U.S.C.A. Sec. 211 (a), that this conduct of the Secretary of State to take up a passport was "A denial of due process clause of Fifth Amendment * * * deprival of life, liberty or property without due process * * *."

Continued the Court on page 451:

"We conclude that revocation of the plaintiff's passport without notice and hearing before revocation, as well as refusal to renew such passport without an opportunity to be heard, was without authority of law."

CONCLUSION.

Therefore, it is the contention of the appellant that a citizen of the United States, Ng Yip Yee, was refused admission to the United States, and that his detention by the Department of Immigration and Naturalization was an unlawful act, provoked without first having charged formally the said Ng Yip Yee with a violation of any laws of the United States or the laws of the respective states.

It is the contention of appellant that the said Ng Yip Yee was the bearer of a valid passport and as such a citizen of the United States, as stated therein was divested of all the rights and privileges pertinent to citizenship, by having his passport summarily invalidated, and debased to the status of a non-resident alien, without notice, hearing or trial.

Lastly, the citizen, Ng Yip Yee, was subjected to an administrative hearing, not a mere routine procedure, of examining any person upon his arrival into the United States, but was given the onerous burden of proof once again to establish the fact that he was a citizen, to the satisfaction of the Department of Im-

migration and Naturalization, who without jurisdiction but with insistence imposed upon Ng Yip Yee an administrative proceeding applicable to an alien, but not to a citizen of the United States.

It is therefore respectfully submitted that the decision of the District Court below be reversed with a direction to discharge the detained, Ng Yip Yee, from the custody of the appellee.

Dated, San Francisco, California,
December 11, 1953.

Respectfully submitted,
SALVATORE C. J. FUSCO,
Attorney for Appellant.

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APPELLANT'S PETITION FOR A REHEARING.

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Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Circuit Judges of the United States Court of Appeal for the Ninth Circuit:

A decision was entered in the above entitled cause on the 24th day of December, 1953, dismissing the appeal and affirming the decision of the trial Court.

It is the affirmed belief of your petitioner that this Court has made an error in the facts and issues, and as a consequence an erroneous finding and rule of law followed.

The erroneous inferences from the facts:

(1) The Court inferred that possession of a passport by Ng Yip Yee was equal to or similar to possession of a certificate of identity.

(2) That Ng Yip Yee, a citizen in possession of a certificate of identity, was seeking admission to the United States as an alien claiming to be a national of the United States.

The erroneous ruling:

(1) That the terms of the Immigration and Nationality Act of 1952, Sec. 360(c), are applicable to a citizen bearing a passport.

(2) That a citizen bearing a passport is subject to an administrative hearing and attendant incarceration.

(3) That *United States v. Sing Tuck,* 194 U.S. 161, is applicable to the case of Ng Yip Yee, who seeks admission as a citizen, and who already sustained a burden of proving his citizenship before the administrative agency of the Secretary of State.

(4) That *Florentine v. Landon,* 206 F. 2d 870 (Cir. 9), presents a different fact situation than the instant case of Ng Yip Yee, which is not properly the subject of an administrative hearing.

(5) That the *United States ex rel Zalunic v. Uhl,* 144 F. 2d 286 (Cir. 2), was erroneously applied for the same reasons as set forth in number 4, supra.

ARGUMENT.

THE ERRONEOUS INFERENCES FROM THE FACTS.

Your petitioner is indeed reluctant to impress this Honorable Court that it erred in the findings of fact upon a subject that this Court has been long familiar with and upon which this Court has countless times ruled. However, the case of Ng Yip Yee is unusual and novel; it is without doubt a case of first impression, and for this reason alone I am encouraged in bringing to the attention of this Honorable Court its own error.

Prior to the enactment of the Immigration and Nationality Act of December, 1952, the method, procedure and conduct of a national born abroad and claiming United States citizenship through his parent, seeking entry to the United States, was to present himself to the American Consul and set forth his claim to United States citizenship, setting forth the fact of offspring of an American citizen. If the Consul found the claim was made in good faith, a certificate of identity would be issued, and the claimant would travel to the United States. Upon arrival in the United States the applicant was thereupon detained and subjected to an administrative hearing for the purpose of establishing his claim to citizenship.

In this type of case, there were no provisions in force whereby any government agency could make a determination to a claim of citizenship and issue a passport to a national prior to his arrival at a port of entry in the United States. This situation prevailed as of December, 1952, and dates back until the

time of the action entitled *United States v. Sing Tuck,* 194 U.S. 161.

The determination of the claimant's right to citizenship fell properly upon the Immigration and Naturalization Service, an administrative agency, and a writ of Habeas Corpus was the remaining remedy upon completion of the administrative hearings, prior to December, 1952.

Counsel for the appellee vigorously categorized the fact situation of Ng Yip Yee with the method above described. Counsel for the appellee sought to disregard the value, significance, and solemnity of an American passport by reminding the Court that it was just another "travel document", that it was similar to a certificate of identity, and that a passport was issued to an alien simply to enable the person to travel to the United States for the purpose of a hearing by the administrative agency, to determine said person's status.

Since the enactment of the Immigration and Nationality Act in December, 1952, and referring specifically to sec. 104(a), (b), (c), (d), (e) and (f) of the said Act, the Consul of the United States at Hong Kong, as an agent of the Secretary of State, has the power to hear, examine and determine a claim to citizenship.

Ng Yip Yee presented himself to the Consular Office and was given a hearing and examination, at which time evidence consisting of photographs, bank drafts showing support by his father, family

correspondence, family group photographs, father's income tax returns, affidavits of sisters and brothers who are ex-servicemen, and blood test reports.

It is well to note that upon investigation of the Ship's Manifests of the American President Lines for the year 1953, we find that Ng Yip Yee was the only person bearing a passport, among hundreds of other citizens bearing passports arriving from Hong Kong, who was forced to suffer detention and submit to an unlawful administrative hearing. This is certain evidence that the method of processing claimants to citizenship has been radically changed since the enactment of the "McCarran Act", so-called, and hereinabove cited, in December, 1952. Therefore, when a passport is issued to a claimant to citizenship, said person has the right to enter the United States as a citizen, subject to the usual rules of inspection, as distinguished from a person who enters merely with a certificate of identity and who has not been residing in the United States, and who has not been adjudicated a citizen and is subject to the detention and examination by the Immigration Service.

THE ERRONEOUS RULINGS.

This Honorable Court thereafter relied upon section 360(c), Immigration and Nationality Act, 8 U.S.C. 1503(c).

This section provides specifically for a person who is in possession of a certificate of identity and does

not apply to a person who is in possession of a passport.

Subsection (c) must read with subsection (b) and is not applicable to Ng Yip Yee, who made an application for a passport, and after sustaining his burden of proof, the Consul by and through the Secretary of State issued to Ng Yip Yee a passport and declared him a citizen of the United States.

Subsection (c) does not apply to the entire act, but must be read with subsection (b).

> "(c) A person who has been issued a certificate of identity under the provisions of subsection (b) * * * shall be subject to all the provisions of this act, relating to the conduct and proceedings involving aliens."

Subsection (b) is limited to persons whose claim to citizenship was denied and then only to persons who had previously resided in the United States or who are under sixteen (16) years of age and born abroad of a United States citizen parent. Subsection (b) provides for the issuance of a certificate of identity to such persons who must have instituted an action under the provisions of 28 U.S.C. 2201 for a declaratory judgment (sec. 360 (a)).

Therefore, Ng Yip Yee being over the age of sixteen (16), born abroad of a United States citizen parent, never having previously resided in the United States, having made no application for a certificate of identity, having instituted no action under 28 U.S. C. 2201, and not having been denied a right or claim to citizenship, clearly does not come within the purview of sec. 360(c).

On the contrary, Ng Yip Yee made an application for a passport, is over the age of sixteen (16), and was not denied any rights of a citizen, but was adjudicated a citizen and was issued a valid passport.

Again, your petitioner wishes to stress with emphasis the significance of sec. 104(a)(3) which clearly defines the jurisdiction and powers of the Secretary of State, in determining the nationality of Ng Yip Yee as distinguished from sec. 103(a), which clearly defines and limits the jurisdiction of the Attorney General with respect to citizens of the United States and that the Attorney General has used his powers in unlawfully detaining Ng Yip Yee and refusing to recognize his rights of an American citizen, by submitting Ng Yip Yee to an unlawful administrative remedy which should not have been instituted, let alone exhausted.

CONCLUSION.

May I again ask the Court to reconsider its ruling on the basis of the novelty of this case, under the "New Laws" of the Immigration and Nationality Act, 8 U.S.C. 1101.

Dated, San Francisco, California,
January 18, 1954.

Respectfully submitted,
SALVATORE C. J. FUSCO,
Attorney for Appellant
and Petitioner.

Certificate of Counsel

I, the undersigned, hereby certify that I am the attorney for Ng Yip Yee, the detained, in the above entitled action, and it is my sincere opinion that the foregoing petition for a re-hearing is based upon substantial questions of fact and points of law, and that said petition for a re-hearing is not interposed for purpose of delay.

Dated, San Francisco, California,
January 18, 1954.

Salvatore C. J. Fusco,
Attorney for Appellant and Petitioner.

No. 14098

United States
Court of Appeals
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Appellant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 11-20-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Petitioner, International Longshoremen's and Wharehousemen's Union, Local 142:

BOUSLOG & SYMONDS,
63 Merchant Street,
Honolulu 13, Hawaii.

For the Respondent:

BLAISDELL & MOORE, By
RAYMOND M. TORKILDSON,
302 Castle & Cooke Building,
Honolulu, Hawaii.

In the United States District Court for the District of Hawaii

Civil No. 1177

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Petitioner,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Respondent.

COMPLAINT FOR BREACH OF CONTRACT AND FOR DECLARATORY JUDGMENT

Now comes the International Longshoremen's and Warehousemen's Union, Local 142, an unincorporated association, petitioner, and for cause of action against Libby, McNeill & Libby, a corporation, respondent, alleges as follows:

I.

That during all times herein mentioned, International Longshoremen's and Warehousemen's Union, Local 142, hereinafter referred to as the union, was and now is an unincorporated labor organization in the Territory of Hawaii, and duly certified by the National Labor Relations Board to represent the employees of the respondent company in the Territory of Hawaii, including Miyuki Takahama; that during all times herein mentioned, said Miyuki Takahama was and now is a member of the

union, and [3*] from 1944 until October 3, 1951, was an employee of the respondent Libby, McNeill & Libby, hereinafter referred to as the company; that at all times herein mentioned the respondent company was and now is a corporation organized and existing under and by virtue of the laws of the State of Maine, and authorized to do and doing business in the Territory of Hawaii.

II.

That on the 15th day of December, 1950, the company and Pineapple and Cannery Worker's Local Union 152, affiliated with the International Longshoremen's and Wharehousemen's Union, hereinafter referred to as the ILWU, made and entered into a written collective baraining agreement effective on said date, and to remain in effect until February 1, 1953; that thereafter on September 14, 1951, said agreement was amended and extended to February 1, 1954; that said agreement has at all times since its effective date been in full force and effect.

III.

That subsequent to the execution of said agreement the said Local Union 152 consolidated with ILWU Local 142 and ever since has been and now is consolidated therewith; that by agreement between the company and ILWU Local 142, said Local 142 has become the successor to Local 152 with respect to said collective bargaining agreement; and all of the terms and provisions of said agreement are now binding between the company and the petitioner union.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

IV.

That the jurisdiction of this Court to grant the relief prayed for herein by the union is based upon Section [4] 301(a) of the Labor-Management Relations Act, 1947, Title 29, U.S.C., Section 185, and upon the Declaratory Judgment Act, Title 28, U.S.C., Sections 2201, 2202.

V.

That on or about the 3rd day of October, 1951, the company informed said Miyuki Takahama that she was, as of October 3, 1951, being discharged and her employment with the company terminated upon the ground that she had reached the age of sixty-five years; that immediately thereafter the union notified the company that its action in discharging and terminating the employment of said Miyuki Takahama consituted a violation of the collective bargaining agreement heretofore referred to, and in that connection the union requested, within the time and in the manner provided for in the agreement, that the merits of the dispute be determined by the grievance procedure provided for in Section 23 of said agreement.

VI.

That pursuant to the provisions of said agreement the various steps provided for in the grievance machinery were carried through and said grievance was not adjusted to the satisfaction of the union in that the company asserted its action did not constitute a violation of any provision of the collective bargaining agreement.

VII.

That after complying with all the procedural steps provided for in the agreement with reference to the presentment of a grievance, the union requested, within the time and in the manner provided for in the agreement, that the grievance be presented to an arbitrator and that the company [5] meet with representatives of the union for the purpose of selecting an arbitrator in the manner provided for in Section 24 of the agreement.

VIII.

That on or about February 7, 1952, the company notified the union that it was the position of the company that there was no reasonable basis for the claim of the union, that there had been any violation of the terms of the agreement and hence there was no grievance within the meaning of the agreement; that the company further stated that to permit arbitration of the issue involved would be contrary to the express terms of the agreement; that accordingly the company did not regard the issue as within the jurisdiction of an arbitrator and therefore declined the request of the union.

IX.

That at all times since said February 7, 1952, the company has refused, failed, and neglected to comply with the said request of the union.

X.

That the action of the company hereinabove set forth was and is a violation and breach of the col-

lective bargaining agreement in that said agreement sets forth the sole means, methods and grounds for the discharge or termination of the employment of an employee of the company; that the agreement does not provide for the discharge or termination of employment upon the ground that the employee has reached the age of sixty-five years.

XI.

That the union was and now is ready, willing and able to present the issue of the discharge and removal of [6] said Miyuki Takahama from the payroll of the company to an arbitrator for determination.

XII.

That an actual controversy now exists between the company and the union as to the meaning and interpretation of the collective bargaining agreement, and it is necessary that this Court determine and declare the rights of the parties under the agreement, and that the company be restrained and enjoined from doing anything in derogation of the rights of petitioner based on the collective bargaining agreement.

XIII.

That the company has informed the union that it is the policy of the company to remove all employees of the company covered by the collective bargaining agreement from the payroll of the company upon their reaching the age of sixty-five. In that connection the union alleges that there are many employees of the company covered by the agreement

who will in the future reach said age and will thereupon be permanently removed from the employ of the company unless the company is restrained and enjoined.

XIV.

That in order to avoid a multiplicity of suits and irreparable injury to the union, it is necessary that this Court issue an injunction enjoining and restraining the company from removing any other employee of the company covered by the collective bargaining agreement from the payroll of the company, solely upon the ground that the [7] employee has reached the age of sixty-five years; that petitioner has no plain, speedy or adequate remedy at law.

Wherefore, petitioner prays judgment as follows:

1. That a declaratory judgment be made and entered herein determining and declaring the rights of petitioner and respondent under the collective bargaining agreement, and specifically declaring and adjudging that respondent breached the terms of the agreement in removing said Miyuki Takahama from the payroll of the company.

2. That the respondent be restrained and enjoined from removing any of its other employees covered by said collective bargaining agreement from its payroll solely upon the ground that the employee has reached the age of sixty-five years.

3. And for such other and further relief as the Court may deem proper in the premises.

Dated: Honolulu, T. H., this 29 day of May, 1952.

BOUSLOG & SYMONDS,

By /s/ MYER C. SYMONDS,
Attorneys for Petitioner.

[Endorsed]: Filed May 29, 1952. [8]

[Title of District Court and Cause.]

ANSWER

Comes Now the respondent, Libby, McNeill & Libby, by its attorneys, and for answer to the complaint of the petitioner in the above-entitled cause, says:

I.

Answering Paragraph I of the complaint, respondent admits that International Longshoremen's and Warehousemen's Union, Local 142, is an unincorporated labor organization in the Territory of Hawaii and duly certified by the National Labor Relations Board to represent some of the employees of the respondent in the Territory of Hawaii, including Miyuki Takahama, and that at all times mentioned in the complaint the respondent was and now is a corporation organized and existing under and by virtue of the laws of the State of Maine, and is authorized to do and is doing business in the Territory of Hawaii, and

that said Miyuki Takahama was an intermittent employee of respondent from June 18, 1942, until August 21, 1942, that she was again employed by the respondent from September 31, 1942, to December 31, 1946; that on or about December 31, 1946, she was retired from employment with the respondent by reason of the fact that she had reached the age of sixty years, such retirement being pursuant to the respondent's policy of retirement to retire [10] from active service all women employees at the age of sixty years; that thereafter on or about June 16, 1947, she was rehired following a change in respondent's retirement policy in Hawaii extending the normal retirement age of women employees to sixty-five years, and continued in respondent's employment until on or about September 28, 1951. Respondent is without knowledge or belief as to the truth of each and every other allegation contained in said Paragraph I of the complaint, and therefore denies such allegations.

II.

Answering Paragraph II of the complaint, respondent admits and alleges that on the 15th day of December, 1950, Pineapple and Cannery Workers Local Union 152, International Longshoremen's and Warehousemen's Union, hereinafter referred to as Local 152, entered into a collective bargaining agreement in writing with Libby, McNeill & Libby, this respondent; that thereafter on the 14th day of September, 1951, said agreement was amended; said agreement is,

and at all times mentioned herein was, in full force and effect. A copy of said agreement, including said amendment, is attached hereto marked Exhibit A and made a part hereof as though the same had been fully set forth herein.

Section 5 of said agreement provides as follows:

"Seniority. In case of layoff, or recall after layoff, length of continuous service with the Company shall govern where all other relevant factors (such as merit, ability, performance, t u r n o u t, physical and mental fitness) are relatively equal. This principle of seniority shall not apply to any employee until he shall have completed six (6) months of continuous service with the Company. Seniority shall be considered broken by (a) discharge, (b) resignation, or (c) six (6) consecutive months of unemployment.

"Before hiring new employees for or promoting present employees to p e r m a n e n t job vacancies above Labor Grade 1 covered by this contract, the job shall be posted on the bulletin boards for a period of seventy-two (72) hours before the job vacancy is filled. This shall not be construed to preclude temporary transfers to fill job vacancies when necessary.

"In making promotions and filling permanent job vacancies, the Company will consider the qualifications of the employee for the job. Where in the judgment of management [11] all of the relevant factors (such as merit, ability, performance, turnout, physical and mental fitness) are relatively

equal, length of service will govern promotions. Grievances resulting from promotions shall be subject to the grievance procedure (Section 23) of the contract but not to arbitration, and all final decisions and judgment of management shall be binding on the parties.

"The Company shall make available to the Union any pertinent seniority information that may be required in the processing of a grievance."

Section 22 of said agreement provides as follows:

"Discharge. Employees shall be subject to discipline or discharge by the Company for insubordination, p i l f e r a g e, drunkenness, incompetence, failure to perform the work as required, violation of the terms of this agreement or failure to observe safety rules and regulations, and the Company's house rules which shall be conspicuously posted. Any discharged employee shall, upon request, be furnished the reason for his discharge in writing. Any employee who has not had six (6) months of continuous service with the Company since the date of his last employment may be summarily discharged. In the event of conflict between the house rules and provisions of this agreement, the agreement will prevail."

Section 17 of said agreement provides as follows:

"Separation Allowance. Regular full-time employees who have completed five (5) or more years of continuous service and who are permanently dropped from service for reasons clearly beyond their own control, shall receive separation allowance to be determined in amount as follows:

"Five years but less than six—two and one-half weeks.

"For each full year in excess of five—and additional one-half week.

"Pay shall be computed upon the basis of a forty (40) hour week and at the classified hourly rate applicable to the employee immediately preceding separation.

"Separation allowance will not be paid in the event of resignation, discharge, or retirement, and this entire provision shall be inapplicable in the event of liquidation of the Company.

"The Company shall determine at the time of layoff whether or not it is expected to be a permanent separation; and if it is not so expected, the employee will not receive separation allowance.

"An employee receiving separation allowance shall forfeit all seniority rights and any other privileges, rights or benefits to which such an employee may now or hereafter be entitled."

III.

Respondent admits the allegations contained in Paragraph [12] III of the complaint.

IV.

Respondent is without knowledge or belief as to the truth of the allegations contained in Paragraph IV of the complaint and therefore denies such allegations.

V.

Answering Paragraph V of the complaint, respondent admits and alleges that on or about the

28th day of September, 1951, said Miyuki Takahama was retired from active service with the respondent by reason of the fact that she had reached the age of sixty-five years, such retirement being pursuant to the respondent's well-known and long-standing policy of retirement to retire from active service all employees when they reach the age of sixty-five years; that on or about the 3rd day of October, 1951, said Miyuki Takahama presented an alleged grievance to respondent alleging a violation by respondent of Sections 5 and 22 of the collective bargaining agreement heretofore referred to; that thereafter, a representative of Local 152 presented said alleged grievance in successive steps to respondent's assistant plant manager, plant manager, general plant manager, to a grievance committee and to respondent's general manager.

Except as herein admitted, respondent denies each and every allegation contained in Paragraph V of the complaint.

VI.

Answering Paragraph VI of the complaint, respondent admits and alleges that a representative of Local 152 presented said alleged grievance in successive steps to respondent's assistant plant manager, plant manager, general plant manager, to a grievance committee, and to respondent's general manager; that at each such step of the grievance procedure respondent took the position that said Miyuki Takahama was retired pursuant to respondent's well-known and long [13] standing

policy of retirement to retire from active service all employees when they reach the age of sixty-five years.

Except as herein admitted, respondent is without knowledge or belief as to the truth of each and every allegation contained in Paragraph VI of the complaint and therefore denies such allegations.

VII.

Answering Paragraph VII of the complaint, respondent admits and alleges that following the presentation of said grievance as hereinabove alleged, a representative of Local 152 requested that the alleged grievance be submitted to an arbitrator to be selected by the petitioner and the respondent under the provisions of Section 24 of said agreement.

VIII.

Respondent admits the allegations contained in Paragraph VIII of the complaint.

IX.

Answering the allegations contained in Paragraph IX of the complaint, respondent alleges that since February 7, 1952, it has maintained its position as alleged in paragraph VIII of the petitioner's complaint herein regarding said request of the union. Except as herein admitted, respondent denies each and every allegation contained in Paragraph IX of the complaint.

X.

Answering Paragraph X of the complaint, respondent denies each and every allegation contained in said paragraph.

XI.

Respondent is without knowledge or belief as to the truth of the allegations contained in Paragraph XI of the complaint and therefore denies such allegations.

XII.

Answering Paragraph XII of the complaint, respondent denies each and every allegation contained in said Paragraph XII. [14]

XIII.

Answering Paragraph XIII of the complaint, respondent admits and alleges that it has informed the petitioner that the respondent's retirement policy provides that all employees shall retire from active service when they reach the normal retirement age of sixty-five years.

Further answering said paragraph, respondent alleges that said retirement policy has been long established, and that at all times mentioned herein and prior to the execution of the collective bargaining agreement heretofore referred to said retirement policy was well-known by Local 152, by the petitioner and by respondent's employees.

Further answering said paragraph, Respondent alleges that the subject of retirement of employees was discussed in collective bargaining negotiations between respondent and Local 152 which resulted in said collective bargaining agreement and in other collective bargaining agreements executed prior thereto between respondent and Local 152 and that no provision relating to the subject of

retirement was included in any of said collective bargaining agreements except as provided in Section 17 of said agreement hereinabove set forth.

Further answering Paragraph XIII of the complaint and except as herein admitted, respondent is without knowledge or belief as to the truth of each and every allegation contained in said paragraph and therefore denies such allegations.

XIV.

Answering Paragraph XIV of the complaint, respondent denies each and every allegation contained in said paragraph.

Wherefore, respondent respectfully prays that the [15] complaint herein be dismissed and that respondent be given judgment for all costs taxable herein and may have such other and further relief as the justice of the cause may require.

Dated at Honolulu, T. H., this 3rd day of September, 1952.

LIBBY, McNEILL & LIBBY,
Respondent,

By BLAISDELL and MOORE,

By /s/ R. M. TORKILDSON,
Attorneys for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed September 3, 1952. [16]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Before the Hon. J. Frank McLaughlin, Judge.

Appearances

Attorney for Petitioner:

BOUSLOG & SYMONDS, By
JAMES A. KING.

Attorney for Respondent:

BLAISDELL & MOORE, By
RAYMOND M. TORKILDSON.

Nature of Proceedings

This is a suit for declaratory judgment, seeking to establish the rights of the petitioner union under a collective bargaining agreement and specifically to declare and adjudge that said collective bargaining agreement has been violated by the respondent with respect to an employee named Miyuki Takahama. It is prayed in this action that the respondent be enjoined from continuing to violate the collective bargaining agreement by retiring people of 65 years for age.

Admitted Facts

The following facts have been agreed upon by the [21] parties and require no proof:

1. That the International Longshoremen's and Warehousemen's Union, Local 142, is the duly certified bargaining agent to represent the employees of the respondent company, including Miyuki

Takahama, having been certified for that purpose by the National Labor Relations Board.

2. That Miyuki Takahama on the date of the filing of this complaint, May 29, 1952, was a member of the union and had been employed by the respondent intermittently from July 18, 1942, until August 21, 1942, and thereafter from September 31, 1942, to December 31, 1946, on which latter date Mrs. Takahama was separated from the employ of the respondent, but resumed the status of an employee on or about June 16, 1947, remaining such until September 28, 1951. Mrs. Takahama on August 8, 1951, had attained the age of 65.

3. The respondent is a corporation organized under the laws of the State of Maine and authorized to do business in the Territory of Hawaii.

4. The union has had during the period of time here involved a collective bargaining contract with the respondent, a copy of which is marked as Pre-Trial Exhibit No. 5. The rights of Local 152 mentioned in said contract passed to the petitioner herein as its successor.

5. On September 28, 1951, Mrs. Takahama was separated by oral notice from the employ of the respondent for the assigned reason that she had celebrated her 65th birthday.

6. Thereafter, pursuant to the grievance procedure provided for in the Collective Bargaining Agreement, Pre-Trial Exhibit No. 5, Mrs. Taka-

hama invoked said provisions, [22] asserting that she had been improperly separated from the respondent's employ in violation of Sections 5 and 22 of said contract.

7. Mrs. Takahama's grievance was not adjusted under the grievance machinery of the contract, and as a result in her behalf the union requested the respondent to submit the issue to arbitration, which request was not acceded to.

8. Mrs. Takahama, during all periods of time that the petitioner and respondent had a collective bargaining agreement when an employee of the respondent, was covered by said contract as a covered intermittent employee.

Petitioner's Contention of Fact

1. That the respondent violated the existing collective bargaining agreement, Pre-Trial Exhibit No. 5, by discharging Mrs. Takahama on September 28, 1951, for having arrived at the age of 65 years.

2. That at the time of Mrs. Takahama's separation from the employment of respondent, she did not become entitled to nor did she receive any pension or retirement allowance or separation allowance or any other gratuity.

3. That Mrs. Takahama was not laid off (see Pre-Trial Exhibit No. 1) nor was she discharged on the date of her separation for any of the causes for discharge set forth in the contract, Pre-Trial Exhibit No. 5.

4. That Mrs. Takahama's grievance should have been arbitrated under the contract. [23]

Respondent's Contention of Fact

1. That Mrs. Takahama was retired for age, pursuant to a long standing policy of retiring people for age, which said policy varied from time to time both as to the factor of age and the factor of sex.

2. That the collective bargaining agreement, Pre-Trial Exhibit No. 5, in no way abrogated the respondent's alleged reserved inherent right to retire employees for age.

3. That Section 22 does not enumerate all the grounds for the discharge for cause which may be invoked by the respondent.

4. That Mrs. Takahama's grievance was not a subject for arbitration under the provisions of this contract.

Petitioner's Contentions of Law

1. That the separation of Mrs. Takahama was a violation of the existing contract, Pre-Trial Exhibit No. 5, in that it was neither a layoff nor a discharge and was in no wise provided for by any of the contract's terms.

2. That Mrs. Takahama's grievance should have been arbitrated under the contract.

Respondent's Contentions of Law

1. That the provisions of the collective bargaining agreement, Pre-Trial Exhibit No. 5, in no way

abrogated or modified or interfered with the respondent's asserted right to retire an employee for age.

2. That the contract in Section 22 did not exhaust the causes for discharge under the contract, which might be [24] relied upon by the respondent.

3. That the separation of this employee from respondent's employ did not violate her seniority or the rights under Section 5 of said contract, nor did it constitute a discharge under Section 22.

4. That Mrs. Takahama's grievance was not a subject for arbitration under the provisions of the contract.

5. That the Court has no jurisdiction to grant injunctive relief.

6. That the facts asserted by the petitioner do not show it to be entitled to equitable relief.

Issues of Fact

1. The petitioner denies the existence on the part of the respondent of any long standing policy of retiring employees for age.

2. The respondent contrariwise contends that it did have such a policy which varied from time to time as to age and sex.

Issues of Law

See Contentions of Law of respective parties above.

Exhibits

1. Seniority List.

2, 3, and 4. Names of other employees apt to be affected by the alleged retirement for age policy within the near future.

5. The collective bargaining agreement as modified and existing on the date of the separation of Mrs. Takahama [25] from respondent's employ.

It is Hereby Ordered that the foregoing constitutes the pre-trial order in the above-entitled cause, that it supersedes the pleadings, which are hereby amended to conform hereto, and that said pre-trial order shall not be amended during the trial except by consent or by order of the Court to prevent manifest injustice.

Dated May 11, 1953.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed May 11, 1953. [26]

[Title of District Court and Cause.]

DECISION

This case is before the Court after hearing pursuant to its Pre-Trial Order of May 11, 1953. By its own terms the order supersedes the pleadings previously filed; it presents the admitted facts and issues of fact and law involved in a controversy over a collective bargaining contract presently existing between the parties.

The first question to be decided is whether or not this Court has jurisdiction to hear the case involving this controversy in relation to the relief demanded under the allegations of jurisdiction contained in the complaint. It invokes jurisdiction under 29 USC 185; the prayer for relief asks a declaration of the contractual rights and duties of the parties under the Declaratory Judgment Act, 28 USC 2201, 2202, and enforcement of the contract by injunction of the alleged breach.

Section 2201 of the Declaratory Judgment Act provides [28] in part that in case of certain actual controversies within its jurisdiction any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration. Thus it seems that this statute does not confer jurisdiction, but merely provides this type of remedy in the federal court. Skelly Oil Co. v. Phillips Petr. Co., (1949) 339 US 667 at 671-2, 70 S.Ct. 876, 94 L.Ed. 1194. Therefore, under the allegations in the instant case, jurisdiction must be found to exist, if at all, under 29 USC 185(a).

That section provides in part.

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, with-

out respect to the amount in controversy or without regard to the citizenship of the parties."

In the case of Castle & Cooke Terminals, Ltd., v. Local 137 of the International Longshoremen's and Warehousemen's Union, et al., 110 F. Supp. 247 (1953) we had occasion to consider the applicability of this section to a demand by an employer for an injunction of an alleged breach of a no-strike contract by the defendant union. The issue of removability was involved, and this in turn depended upon the possible origin of the cause of action in federal law. This Court thought that, among other reasons, the restrictions against anti-labor injunctions surviving in the Norris-LaGuardia Act (29 USC 101-115, 104) prevented this Court from giving the [29] only relief demanded. Reference was made in that opinion to congressional committee reports and statements in Congress by an author of the bill containing section 185. Therein it appeared that the attention of Congress was on the subject of suits for money damages for breach of these collective bargaining contracts. This being true, it follows that Congress can hardly be said to have intended to act, through section 185, in the field of injunctions, whether they would be granted for or against the labor side of such a controversy. Therefore, the section gave the courts no new power to enjoin the acts in question. Without power to act in the matter, there was no original jurisdiction of the equity suit.

With this background, the question of constitu-

tionality of 29 USC 185 was raised in this court in Waialua Agricultural Co., Ltd., v. United Sugar Workers, ILWU, et al., Civil 1132, decided June 18, 1953, amended July 17, 1953. That action was for damages for breach of a labor relations contract, sought by the employer from the union which contended that this section was an invalid attempt to extend the federal judicial power when it purported to confer jurisdiction irrespective of diversity of citizenship. This Court agreed with several others that section 185 is not unconstitutional for this reason, because it was intended to, and did, create substantive federal law. The ramifications of that law were not declared by Congress; indeed, it did not indicate whether it intended the federal courts to apply the contract law of the states wherein they sit, [30] or to develop a separate and distinct federal common law of collective bargaining contracts where interstate commerce is affected. It now appears that such a federal common law may be in the course of development, although all courts are not in agreement on the extent or nature of the rights created by the legislation, nor do they agree upon the extent of the remedies available. See, as examples:

Wilson and Co. v. United Packinghouse Workers, 83 F. Supp. 162 (1949 SDNY);

Colonial Hardwood Flooring Co. v. Internat., etc., Union, 76 F. Supp. 493 (1948 D. Maryland) aff'd 168 F. 2d 33;

Shirley-Herman v. Internat. Hod Carriers, etc., 182 F. 2d 806 (2 Cir. 1950);

Schatte v. International Alliance, etc., 84 F. Supp. 669, aff'd 182 F. 2d 158, reh. denied, 183 F. 2d 685, cert. denied, 340 US 827, reh. denied, 340 US 885;

Textile Workers Union of America v. Aleo Mfg. Co., 94 F. Supp. 626 (1950 M.D. N.C.);

United Shoe Workers v. LeDanne, 83 F. Supp. 714 (1949 D. Mass);

Duris, et al., v. Phelps-Dodge, et al., 87 F. Supp. 229 (1949 D. N.J.);

Studio Carpenters, et al., v. Loew's Inc., 182 F. 2d 168 (9 Cir. 1950);

A. F. of L. v. Western Union, 179 F. 2d 535 (6 Cir. 1950).

When it becomes necessary to analyze the extent of the jurisdiction conferred by 29 USC 185, it would seem generally true that the jurisdiction granted will not be found to have a wider scope than necessary to complete the permissible action of the court in these circumstances of limited jurisdiction. This concept was expressed in [31] the Castle & Cooke case (supra) when we referred to the "absurdity of a case which 'may be brought' in a federal district court in which there is no power to give the relief demanded." In that case the injunctive relief had been demanded by an employer against a union. Here the question is whether this court has power under this section, wherein diversity of citizenship is not a jurisdictional basis, to grant an injunction against an employer at the

demand of a union. In Castle & Cooke, the latent lack of clarity of the section was disclosed by reference to surviving limitations in the Norris-LaGuardia Act. There is some doubt about whether those limitations have the same application where the labor organization is plaintiff (see Duris, et al., v. Phelps-Dodge, et al., 87 F. Supp. 229 (1949 D.N.J.); contra Textile Workers Union of America v. Aleo Mfg. Co., 94 F. Supp. 626 (1950 M.D.N.C.)). It seems helpful here to recall our conclusion that Congress had in mind suits for damages when it acted in passing section 185, and apparently was thinking primarily of suits by employers against unions in contract cases, since it showed most consideration for the welfare of individual union members and their estates by exempting the latter from liability for judgments obtained against the unions. It is true that no obstruction was placed in the way of a suit by a union for damages, and equally true that the unions have since taken advantage of their capacity to sue for monetary recovery: Lexington Federation of Tel. Workers v. [32] Ky. Tel. Corp., 11 FRD 526 (1951 E.D. Ken.); Durkin v. J. Hancock Life Insurance Co., 11 FRD 147 (1950 S.D.N.Y.); United Shoe Workers v. LeDanne, 83 F. Supp. 714 (1949 D. Mass.); Studio Carpenters, etc., v. Loew's Inc., 182 F. 2d 168 (9 Cir. 1950).

The fact that parties have elected to seek damages rather than equity relief under this section does not of itself necessarily set any limitations or indicate the intent of Congress. It is our opinion that 29 USC 185 conferred jurisdicition for the

sole purpose of actions for damages. Whatever equity power the court may have, exclusive of ancillary remedies, it must therefore stem from some other basis of jurisdiction than section 185, and no other basis has been alleged here.

We recognize that a divergence exists between this view and that of a few other courts which have taken jurisdiction of suits under 29 USC 185 for injunctions of breach of collective bargaining contracts or for other related equitable remedies:

> Textile Workers Union of America v. Aleo Mfg. Co., 94 F. Supp. 626 (1950 N.D.N.C.);
>
> Textile Workers Union of America v. Arista Mills Co., 193 F. 2d 529 (4 Cir. 1951);
>
> Mt. States Div., etc., v. Mt. States Tel. Co., 81 F. Supp. 397 (1948 D. Col.);
>
> A. F. of L. v. Western Union, etc., Co., 179 F. 2d 535 (6 Cir. 1950);
>
> Textile Workers Union of America v. American Thread Co., DC Mass., Civil 52-503, June 5, 1953.

In the light of the legislative history of this section, however, this Court feels that it cannot properly be said [33] that Congress intended to act in a field to which its attention clearly was not directed. Therefore, this case, in which jurisdicition is alleged to exist solely under 29 USC 185, and in which the demand is for an injunction of breach of a labor relations contract after a declaration of the rights of the parties, is before a court which has not been given the power to grant the relief

prayed for, and the case must therefore be dismissed.

This appears to be the extent of the questions to which the Court may properly give its attention; we need not, therefore, go into detail in expressing our doubts that this contract included retirement as a subject of the collective bargaining between these parties.

Dated at Honolulu, Hawaii, August 6, 1953.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed August 6, 1953. [34]

In the United States District Court for the District of Hawaii

Civil No. 1177

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Petitioner,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Respondent.

ORDER OF DISMISSAL

The above-entitled action having come on for hearing before this Court on the 12th day of May, 1953, pursuant to the Court's pre-trial order of

May 11, 1953, and the Court having filed its written decision on August 6, 1953, holding that said action must be dismissed upon the ground and for the reason that this Court lacks jurisdiction of said action,

Wherefore, It Is Ordered, Adjudged and Decreed that the said action be, and the same hereby is, dismissed.

Dated at Honolulu, T. H., this 12th day of August, 1953.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-Entitled Court.

Approved as to Form:

BOUSLOG & SYMONDS,

By /s/ MEYER C. SYMONDS,
Attorneys for Petitioner.

[Endorsed]: Filed August 12, 1953. [36]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now International Longshoremen's and Warehousemen's Union, Local 142, petitioner above named, by Bouslog & Symonds, its attorneys, and moves this Honorable Court that the Order of Dismissal entered herein on August 12, 1953, be vacated and set aside and that a new trial be granted in

that the Court erred in dismissing the above-entitled action upon the ground and for the sole reason that the Court lacked jurisdiction of the action.

This motion will be based upon the Points and Authorities filed herewith and upon all the records and files herein.

Dated: Honolulu, T. H., this 21st day of August, 1953.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142,
Petitioner.

By BOUSLOG & SYMONDS,

By /s/ EDWARD H. NAKAMURA,
Its Attorneys. [38]

NOTICE OF MOTION

To Blaisdell & Moore, Attorneys for Libby, McNeill & Libby, a Corporation, Respondent:

You and Each of You Will Please Take Notice that the foregoing motion for new trial will be heard before the Honorable J. Frank McLaughlin in his courtroom in the Federal Building, Honolulu, T. H., on Thursday, September 3, 1953, at 9:00 a.m., or as soon thereafter as the motion can be heard.

Dated: Honolulu, T. H., this 21st day of August, 1953.

BOUSLOG & SYMONDS,

By /s/ EDWARD H. NAKAMURA,
Attorneys for Petitioner. [39]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

This Court has jurisdiction to grant a new trial. (Federal Rules of Civil Procedure, Rule 59.)

The Court erred in holding that the federal court does not have jurisdiction to grant a declaratory judgment and injunction for breach of a collective bargaining agreement. (See cases cited on page 6 of the Decision herein.)

The holding of the Court, "It is our opinion that 29 U.S.C. 185 conferred jurisdiction for the sole purpose of actions for damages," is erroneous. Section 185 (a) specifically provides that suits for violation of contracts between an employer and a labor organization representing employees may be brought in the district court. There are no words of limitation with respect to the nature of a suit over which the court has jurisdiction. The language in paragraph "b" that any money judgment against a labor organization shall [40] be enforceable only against the organization as an entity and against its assets, are not words limiting the jurisdiction of the court to entertain suits under paragraph "a" to suits seeking money judgments for damages for violation of the collective bargaining agreement. The words referred to in paragraph "b" are words of limitation only with respect to the type of money judgments that the court may give in the event a suit seeks the same.

In its present decision, this Court referred to its

opinion in the Castle & Cooke Terminals v. Local 137, etc., 110 F. Supp. 247. Therein this Court, after referring to Congressional statements, in effect concluded that it was the Congressional intent that Section 185 was intended to confer jurisdiction only with respect to money judgments. It is submitted this conclusion is erroneous. Senator Murray at the time of debate made this statement:

> "Section 301 of Title II of the bill gives the Federal district courts broad jurisdiction to entertain suits for breach of collective-bargaining contracts in industries affecting interstate commerce, regardless of the amount in controversy and of the citizenship of the parties. This section permits suits by and against a labor organization representing employees in such industries, in its common name, with money judgments enforceable only against the organization and its assets."
>
> See Congressional Record, 4/25/47, page 4153. Also quoted in "The New Labor Law" by the Bureau of National Affairs in Appendix E (7)-1.

Also, Senator Smith made this statement:

> "I now come to Title III, which is very brief, and merely provides for suits by and against labor organizations, and requires that labor organizations, as well as employers, shall be responsible for carrying out contracts legally entered into as the result of collective bargaining. That is all Title III does. I cannot con-

ceive of any sound reason why a party to a contract should not be responsible for the fulfillment of the contract; it is outside my comprehension how anyone can take such a position."

See Congressional Record, 4/30/47, page 4410. [41] Also quoted in "The New Labor Law" by the Bureau of National Affairs in Appendix E (7)-3.

Furthermore, although disagreeing with this Court's decision in the Castle & Cooke Terminals case as it is in conflict with the decided cases referred to by the Court in its present decision on page 6, assuming the Court to be correct, its decision is limited to its holding that Congress, by way of Section 185 (a), did not intend to change the existing limitation imposed by the Norris-La Guardia Act to permit district courts to hear injunction suit cases against labor organizations even though they should arise out of violations of labor relations contracts. The instant suit seeks primarily a declaratory judgment with respect to the rights of the parties under the collective bargaining agreement with respect to the sole issue of retirement. The injunction prayed for would only be granted after the court has declared the rights of the parties, and then, only in event it finds the employer to have violated the agreement with respect to retirement. Thus, two grounds of relief are sought. Even though this Court may be of the opinion that its decision in the Castle & Cooke Terminals case be correct

because of the Norris-LaGuardia Act, the decision does not prevent the Court from having jurisdiction to grant the declaratory relief prayed for.

Section 185 is part of the amendment to the National Labor Relations Act adopted by Congress with the intention of trying to bring about peaceful management-labor industrial relations. Certainly it cannot be denied that the first step in carrying out such intent is for the Court, when the parties do not agree upon the meaning of their written agreement, to construe the agreement for the parties so that they will know their rights and [42] obligations.

The decision of this Court in the instant case, instead of helping to bring about industrial harmony as intended by Congress, leaves the parties in a state of disagreement with respect to the meaning of their agreement, thus tending to bring about disharmony and friction in the field of labor-management relations.

Dated: Honolulu, T. H., this 21st day of August, 1953.

BOUSLOG & SYMONDS,

By /s/ EDWARD H. NAKAMURA,

Attorneys for Petitioner.

[Endorsed]: Filed August 21, 1953. [43]

[Title of District Court and Cause.]

RULING ON MOTION FOR NEW TRIAL

By a timely motion pursuant to Rule 59 of the Federal Rules of Civil Procedure, the plaintiff in this action has moved for a new trial. The essential ground of the motion appears to be that the court erred in interpreting the extent of the jurisdiction granted by 29 U.S.C. 185, which is the sole basis alleged for jurisdiction of this action. Under the decision, jurisdiction is conferred on district courts, irrespective of citizenship of the parties or the amount in controversy, only in suits for damages arising from violation of collective bargaining contracts between an employer in interstate commerce and a recognized bargaining representative of his employees.

The plaintiff's first argument is that the wording of the statute is clearly broader than this, and does not require this limited interpretation. If this were the only statute bearing upon the situation this point would [45] probably have more weight. However, we have pointed out that the presence of surviving jurisdictional limitations imposed by the Norris-LaGuardia Act, 29 U.S.C. 104, raised, in a prior case (Castle and Cooke Terminals, Ltd., v. Local 137 of ILWU, 110 F. Supp. 247, Hawaii, 1953), a latent ambiguity as to the actual intent of Congress when it was in the course of passing this section which is a part of the Taft-Hartley or Labor-Management Relations Act of 1947. To resolve that ambiguity in deciding Castle and Cooke

(supra) we referred to committee reports and statements of the authors of the bill and concluded that the attention of Congress was on suits for damages, and on the point of relieving individual union members from financial responsibility should such suits go against their union, and not upon the field of injunctive remedies at all.

We adhere to our interpretation of the intent of Congress because it seems to be irresistible that, once an ambiguity is shown to exist in a statute, and the ambiguity is resolved by consultation of the proper Congressional records which show the legislative intent to have been focused on a limited field, we cannot find that Congress intended to act in other fields which it clearly did not have in mind. Therefore we still think that Section 185 does not constitute a basis of jurisdiction for the instant action.

Another argument by plaintiff is that even if the court does not have the power to grant an injunction, it [46] should declare the rights of the parties herein without attempting to give the other relief asked.

The Declaratory Judgment Act, 28 U.S.C. 2201, 2202, gives the court power to make such a judgment in a case of actual controversy within its jurisdiction. It provides, inter alia, that this may be done whether or not further relief is or could be sought. It appears well settled, however, that this Act does not repeal or modify the basic requirements of jurisdiction previously imposed, and if the

court has not had power over certain subject matter or persons, the declaratory judgment statute does not give it.

> Skelly Oil Co. v. Phillips Petr. Co. (1949), 339 U.S. 667, at 671-2;
>
> Doehler Metal Furn. Co., Inc., v. Warren, 129 F. 2d 43 (App.D.C., 1942).

It follows that the mere fact that a declaratory judgment is sought is not, of itself, a ground of federal jurisdiction:

> Calif. Ass'n of Employers v. Bldg. and Const. Trades Council, etc., 178 F. 2d 175, at 177 (9 Cir. 1949).

Thus the expression "whether or not further relief is or could be sought" in 28 U.S.C. 2201 refers to whether the controversy between the parties has reached a stage at which some further remedy could be demanded according to recognized principles of law. It does not permit the assumption of jurisdiction which would not otherwise exist.

Finally, it is argued that compliance with the demands for relief in this case would most effectively carry out the declared policy of Congress in enacting the [47] legislation of which 29 U.S.C. 185 is a part—the promotion of peaceful relations between these and similar parties:

> 29 U.S.C. 141 (b).

However true this might be, where there are indications that Congress intended the courts to go

only so far in carrying out its policies, it is not within the province of the court to go further because it or the parties think Congress should have done more than it did.

For the reasons expressed herein, the motion for new trial is denied.

Dated: Honolulu, Hawaii, September 25, 1953.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed September 25, 1953. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that International Longshoremen's and Warehousemen's Union, Local 142, an unincorporated association, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal made and entered herein on the 12th day of August, 1953, holding that the action must be dismissed upon the ground and for the reason that the Court lacks jurisdiction of the action, and from the ruling on motion for new trial made and entered herein on September 25, 1953, denying the motion for new trial for the same reason as set forth in the Order of Dismissal.

Dated: Honolulu, T. H., this 1st day of October, 1953.

BOUSLOG & SYMONDS,

By /s/ EDWARD H. NAKAMURA,

Attorneys for Appellant International Longshoremen's and Warehousemen's Union, Local 142, an Unincorporated Association.

[Endorsed]: Filed October 1, 1953. [50]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to Libby, McNeill & Libby, a corporation, respondent, the sum of Two Hundred Fifty and 00/100 Dollars ($250.00). The condition of this bond is that, whereas the petitioner has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed October 1, 1953, from the order of this Court, dated August 12, 1953, and from the ruling on Motion for New Trial entered September 25, 1953, if the petitioner shall pay all costs adjudged against it if the appeal is dismissed or the order affirmed, or such costs as the appellate court may award if the order is modified, then this bond is to be void, but if the petitioner fails to perform this condition, [52] payment

of the amount of this bond shall be due forthwith.

Dated: Honolulu, T. H., this 1st day of October, 1953.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association, Petitioner,

By /s/ ANTONIO RANIA,
Its President,
Principal.

[Seal] UNITED STATES FIDELITY & GUARANTY COMPANY,

By /s/ JOHN F. HRON,
Its Attorney in Fact,
Surety.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 1st day of October, 1953, before me appeared Antonio Rania, to me personally known, who being duly sworn did say that he is the President of the International Longshoremen's and Warehousemen's Union, Local 142, which is the principal named in the foregoing Bond on Appeal, and that he acknowledged said instrument as his free act and deed.

[Seal] /s/ J. D. MARQUES,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires: July 15, 1957.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 1st day of October, 1953, before me personally appeared John F. Hron, to me personally known, who [53] being duly sworn did say that he is the Attorney-in-Fact of the United States Fidelity and Guaranty Company, duly appointed under Power of Attorney dated the 30th day of November, 1936, which Power of Attorney is now in full force and effect, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation under the authority of its Board of Directors, and said John F. Hron acknowledged said instrument to be the free act and deed of said corporation.

[Seal] /s/ MARY LUIS,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires May 31, 1955.

[Endorsed]: Filed October 1, 1953. [54]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do

hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from page 1 to page 57, consists of a statement of the names and addresses of the attorneys of record, and of the various pleadings and transcripts of proceedings as hereinbelow listed and indicated:

Originals:

Complaint for Breach of Contract and for Declaratory Judgment.

Answer.

Pre-Trial Order.

Decision.

Order of Dismissal.

Motion for New Trial, Notice of Motion, Points and Authorities.

Ruling on Motion for New Trial.

Notice of Appeal. [58]

Bond for Costs on Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of October, A.D. 1953.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

[Endorsed]: No. 14098. United States Court of Appeals for the Ninth Circuit. International Longshoremen's and Warehousemen's Union, Local 142, an unincorporated association, Appellant, vs. Libby, McNeill & Libby, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed: October 26, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14098

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Petitioner,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Respondent.

STATEMENT OF POINTS ON APPEAL

The points upon which appellant will rely on appeal are:

1. The Court erred in dismissing the action upon the ground and for the reason that the Court lacks jurisdiction of the action.

2. The Court erred in refusing to grant a new trial.

Dated: Honolulu, T. H., October 14, 1953.

BOUSLOG & SYMONDS,

By /s/ MEYER C. SYMONDS,

Attorneys for Petitioner-Appellant.

[Endorsed]: Filed October 26, 1953.

No. 14098

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,
Appellant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF

BOUSLOG & SYMONDS
MYER C. SYMONDS
63 Merchant Street
Honolulu, Hawaii
Attorneys for Appellant.

Of Counsel,
Edward H. Nakamura
63 Merchant Street
Honolulu, Hawaii.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 14098

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Appellant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Appellee.

Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a final order and judgment of the United States District Court for the District of Hawaii dismissing appellant's suit for breach of contract and for declaratory judgment on the ground that the court was without jurisdiction to grant the relief prayed (R. 30–31). Appellant invoked the jurisdiction of the District Court under Section 185 (a) of Title 29 of the United States Code conferring on district courts jurisdiction of suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, without regard to the amount in controversy or the citizenship of the parties, and the declaratory judgment provisions contained in Sections 2201 and 2202 of Title 28 of the United States Code.

The jurisdiction of this Court to review the final order and judgment of dismissal is conferred by Section 1291 and Section 451 of Title 28 of the United States Code.

STATEMENT OF THE CASE

The International Longshoremen's and Warehousemen's Union, Local 142, the appellant herein, brought suit in the United States District Court for the District of Hawaii against Libby, McNeill & Libby, appellee herein, seeking to have its rights under a collective bargaining agreement declared and established and to have the company declared to be in violation of the agreement. By way of ancillary relief to the declaration of rights, the union sought to have the company enjoined from continuing to violate the collective bargaining agreement in force between the parties by terminating the employment of employees who reach the age of 65 years, solely on the ground of age (R. 3–7). The company filed its answer admitting some and denying other allegations of the complaint (R. 9–17).

After a pre-trial conference, the court entered a pre-trial order on May 11, 1953 (R. 18–22). The trial of the case was held on May 12, 1953. The court filed its decision on August 6, 1953, holding that the court was without power to grant the relief prayed, and that the case must be dismissed (R. 23–30).

On August 12, 1953 the court made and entered its final order of dismissal (R. 30–31). On August 21, 1953 the union filed its motion for a new trial (R. 31–36). On September 25, 1953 the court filed its ruling denying the motion for a new trial (R. 37–40).

Notice of appeal and appellant's bond were filed on October 1, 1953 (R. 40–43).

The admitted facts set forth in the pre-trial order show: The International Longshoremen's and Warehousemen's Union, Local 142 is the duly certified bargaining agent of

the employees of Libby, McNeill & Libby, including Miyuki Takahama. There was and now is an existing collective bargaining agreement between the company and the union. Miyuki Takahama, on the date of the filing of the complaint, was a member of the union, and until September 28, 1951 was an employee of the company. On that date Mrs. Takahama was separated from her employment by the company on oral notice for the assigned reason that she had passed her 65th birthday. Mrs. Takahama, under the grievance procedures provided for in the collective bargaining agreement between the parties, had asserted her improper separation from the company's employ in violation of Section 5 and 22 of the contract. Mrs. Takahama's grievance was not adjusted under the grievance machinery of the contract, and the company refused the union's request to submit the issue to arbitration (R. 18–21). The union sought from the court a declaratory judgment determining and declaring its rights under the collective bargaining agreement and specifically declaring the company had breached the terms of the agreement in removing Miyuki Takahama from its payroll, and an injunction against the company restraining it from removing any of its other employees covered by the collective bargaining agreement from its payroll solely upon the ground that the employee had reached the age of 65 years (R. 8).

The court held (1) that Section 185 of Title 29 of the United States Code conferred jurisdiction on district courts "for the sole purpose of actions for damages" and hence the court had, under that section, no jurisdiction to grant declaratory relief (R. 28–29), (2) that by reason of the inclusion of the prayer for injunctive relief, the court was without jurisdiction of the entire action by virtue of the provisions of the Norris–La Guardia Act contained in Sections 101–115 of Title 29 of the United States Code.

SPECIFICATIONS OF ERRORS

Assignment No. 1

The United States District Court for the District of Hawaii, hereinafter referred to as the Court, erred in dismissing the action upon the ground and for the reason that the Court lacks jurisdiction of the action.

Assignment No. 2

The Court erred in refusing to grant a new trial upon the same ground and reason stated above.

SUMMARY OF ARGUMENT

Section 185 of Title 29 of the United States Code confers jurisdiction on the District Court of "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . ." The statute does not in any way qualify the term "suits." The Court's decision which limited the jurisdiction to actions for monetary damages was an unwarranted limitation of the jurisdiction conferred by Section 185, and contrary to the avowed policy of the Labor-Management Relations Act, 1947. Both the language of the section and the decided cases support the appellant's contention that the jurisdiction of the courts is broader than suits for money damages. The Court had jurisdiction to entertain the cause, declare the rights of the parties, and upon a proper showing, grant ancillary injunctive relief.

ARGUMENT

The District Court dismissed appellant's action on the ground that it lacked jurisdiction of the cause. In its decision the court held:

(1) That since injunctive relief was part of the prayer of the appellant, the court was precluded by reason of the provisions of the Norris–La Guardia Act (29

United States Code 101–115) from exercising jurisdiction. The court said:

> Therefore, this case, in which jurisdiction is alleged to exist solely under 29 United States Code 185, and in which the demand is for an injunction of breach of a labor relations contract after a declaration of the rights of the parties, is before a court which has not been given the power to grant the relief prayed for, and the cause must be dismissed. (R. 29, 30.)

(2) That "29 United States Code 185 conferred jurisdiction for the sole purpose of actions for damages," (R. 28, 29) and hence, inferentially did not authorize the declaratory relief sought by appellant.

The appellant was seeking a declaration of its rights under a collective bargaining agreement. It sought specifically a declaration that the appellee was in violation of the agreement when it separated Mrs. Miyuki Takahama from its employ and when it refused to submit the matter to an arbitrator for decision. (R. 21.)

If the declaration of rights was favorable, appellant sought an order enjoining appellee from further violating the agreement. What the appellant sought primarily was the establishment of its rights, and the injunctive relief prayed for was dependent upon and ancillary to the declaration.

Section 185 of Title 29, United States Code, which the court construed as permitting only suits for damages, provides in part:

> "a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship."

This section contains no words of limitations with respect to the nature of a suit over which the court has jurisdiction. The court, however, read the reference to money judgment against unions contained in Section 185 (b) into Section 185 (a). The pertinent part of Section 185 (b) reads as follows:

> ". . . Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

There is nothing in this section relating to or limiting the type of action that can be brought by employers or labor organizations for breach of collective bargaining agreements. It merely protects the estates of the individual members of unions in the event of a money judgment against a labor organization.

The court went behind the language of the section to find a supposed Congressional intent. The court reasoned that as Congress apparently was thinking primarily of suits by employers against unions when it passed Section 185, only suits for damages were allowed. To buttress this reasoning the court found that Congress "showed most consideration for the welfare of individual union members and their estates by exempting the latter from liability for judgments obtained against unions." (R. 28.)

It is common knowledge that labor organizations have expressed the view that the motivation of Congress in adopting the Act was anti-union, and pro-employer. Motivation behind an enactment as a whole differs from legislative intent. Where the language of a section is clear, principles of statutory construction require that the court accord to the words of the statute their clear meaning.

That a union might sue an employer under Section 185 (a) was not questioned even by the trial court. The

quoted portion of Section 185 (b) has no application at all to a suit by a union against a company, but applies only when a company gets a money judgment against a union. This contention that Section 185 (b) limits the jurisdiction of courts under Section 185 (a) is untenable for this very reason. If Congress had intended to limit such suits under Section 185 (a) to damage suits only, it would have been a simple matter to qualify the term "suits."

The avowed purpose Congress expressed in the Labor-Management Relations Act, 1947, commonly called the Taft Hartley Act, was to stabilize labor relations. Part of the policy of the Act which Congress expressed in the Act itself was to provide orderly and peaceful procedures for preventing the interference by either employers, employees, or labor organizations with the legitimate rights of others. [29 USC 141 (b)]. The provisions for the enforcement of collective bargaining agreements were enacted to carry out this expressed policy.

In the instant case, appellant sought the aid of the court to determine its rights under a collective bargaining agreement after a dispute had arisen as to the meaning of the agreement. It turned to the courts when the appellee refused to settle the controversy by arbitration as provided for under the contract. If the courts limit the application of Section 185 (a) to monetary damages only, the intent of Congress to provide legal machinery for the enforcement of collective bargaining agreements is nullified.

The district court's interpretation that Section 185 (a) is limited to damage suits only and does not encompass declaratory relief is in conflict with the rulings of federal district and appellate courts on this issue. Indeed, appellant has been able to find no case supporting the district court on this aspect of its ruling, and the district court cited none.

In *American Federation of Labor v. Western Union Telegraph Co.,* 179 F. 2d 535 (6 Cir. 1950) , the plaintiff union

filed an action for a declaratory judgment for breach of a collective bargaining agreement. The district court dismissed the action for want of jurisdiction. On appeal, the judgment was reversed by the Sixth Circuit Court of Appeals, and the case remanded for trial on the merits.

The plaintiff in the *Western Union* case, as in the instant case, asserted that jurisdiction of the United States District Court was based on 29 USC 185 and 28 USC 2201, 2202. The Court of Appeals said at page 538:

> "We are of opinion that the complaint clearly states a cause of action of which the United States District Court has jurisdiction. The action is one for violation of contract between appellant and appellee within the express provisions of Section 301 (a) of the Labor-Management Relations Act of 1947; and Section 400 of the Federal Declaratory Judgment Act vests in the Federal court the right to grant the character of relief prayed if appellant proves the allegations of its complaint . . ."

In *Milk & Ice Cream Drivers and Dairy Employees Union, Local 98 v. Gillespie Milk Products Corp.,* 203 F. 2d 650 (6 Cir. 1953), the plaintiff union brought an action under 29 USC §185 and 28 USC §§2201, 2202, to enjoin the employer from violating a collective bargaining agreement. The employer moved to dismiss the complaint upon the ground that the complainant's prayer for injunction must be denied because of the compulsions of the Norris–La Guardia Act. The District Court granted the motion. The Court of Appeals reversed the decision and remanded the cause for trial on its merits. In commenting on Section 185, the Court said at page 651:

> "We think the unqualified use of the word 'suits' in the Labor-Management Relations Act authorizes injunctive process for the full enforcement of the substantive rights created by Section 301 (a), which reads: [quoting 29 USC 185 (a)]"

In *Textile Workers Union of America v. Aleo Manufacturing Co.,* 94 F. Supp. 626 (M. D. N. C. 1950), the union brought action against the company to compel defendant to comply with terms of a collective bargaining agreement. The court held that the complaint stated a cause of action within the jurisdiction of the Labor-Management Relations Act and the Federal Declaratory Judgment Act. In discussing the power of the court to grant injunctions, the court held that the Norris–La Guardia Act did not preclude the issuance of an injunction where the union was seeking a mandatory injunction requiring the defendant to perform its collective bargaining agreement. The court states at page 629 of the opinion:

> "The remaining point raised by the defendant challenges the power of the court to grant injunctive relief on account of the inhibitions of the Norris–La Guardia Act, 29 U.S.C.A. §101 et seq. Defendant insists that the court is barred from issuing an injunction in any case involving a labor dispute, citing 29 U.S.C.A. §52 and 29 U.S.C.A. §104 (a) and (c). Plaintiff is not seeking an injunction against the defendant doing anything embraced in (a) or (c). A mandatory injunction requiring defendant to perform its agreement in no manner involves (a) or (c). These sections are limitations in behalf of employees; they have no application to an injunction against an employer. Any statement in the decisions purporting to give the broad construction claimed by the defendant will be found in cases where an injunction was sought by the employer. It is inaccurate to say that the court is barred from issuing an injunction in any case involving a labor dispute. . . ."

Another case where the court did not hesitate to exercise jurisdiction over an action for declaratory judgment and other relief under 29 USC §185 was the case of *Textile Workers Union of America v. Arista Mills Co.* The district court denied the injunctive relief and damages prayed for but declared the rights of the parties under the agreement.

This was affirmed by the Court of Appeals for the Fourth Circuit in 193 F. 2d 529.

Other cases where the plaintiffs sued for declaratory judgment and further relief are *United Protective Workers v. Ford Motor Co.,* 194 F. 2d 997 (7 Cir. 1952) and *Alcoa Steamship Co. v. McMahon,* 81 F. Supp. 541 (S. D. N. Y. 1948). In both of these cases, jurisdiction to grant declaratory relief was not questioned. In the *Alcoa* case, a declaratory judgment was entered even though the court said that injunctive relief was precluded by the Norris–La Guardia Act. In *Mountain States Division No. 17, Communication Workers of America v. Mountain States Telephone and Telegraph Co.,* 81 F. Supp. 397 (D. C. Colo., 1948), the plaintiff union sought to enjoin defendant employer from refusing to comply with collective bargaining contracts. In construing Section 185 (a) and (b) and the relief available under it, the court said at page 402 of the opinion:

> "Tit. III, which contains §301 (a), (b), etc., is an entirely new provision. The query naturally arises, why was it enacted as an amendment to the original Act, were it not the intent to remove the exclusive jurisdiction of the board and give the courts the right to exercise equity powers in cases not involving unfair labor practices. Further, the relief sought here is wholly foreign to anything prohibited by the Norris–La Guardia or Clayton Acts, which were aimed at cases involving strikes, lockouts, picketing, etc.
>
> "In conclusion we are of the opinion, and find: (a), the court has jurisdiction, as the case does not involve a labor dispute as defined in the Act, and falls within the exception of §301 (a), (b), vesting exclusive jurisdiction in the board. (b), the contract is still valid, not having been cancelled by either party either pursuant to the terms of the contract or the Act itself. And (c), upon the authorities cited the plaintiff has no adequate remedy at law, and injunctive relief is indicated.

In the recent case of *Textile Workers Union v. American Thread Co.,* 113 F. Supp. 137 (D.C. Mass. 1953), the plaintiff union sought the specific enforcement of an arbitration clause in a collective bargaining agreement. The requested relief was granted. The court, at page 141, was of the opinion that the legislative purpose in enacting Section 185 was broad enough to allow specific enforcement. This case also discussed the application of the Norris–La Guardia and the Federal Arbitration Acts to cases where a mandatory injunction is sought to enforce an arbitration clause. At page 142, the court said:

> In reaching the conclusion that under §301 of the Taft–Hartley Act federal courts can specifically enforce arbitration clauses in labor contracts, this Court has not overlooked either the Federal Arbitration Act of 1925, 9 U.S.C. §1 et seq., or the Norris–La Guardia Act of 1932, 29 U.S.C.A. §101 et seq. The former was drafted a generation ago, prior not only to the Taft–Hartley Act but also the labor relations situation that has developed since the 1930's. If that Act reflects any policy toward enforcement of voluntary arbitration clauses in labor contracts, it is a policy strictly confined to the interpretation and direct enforcement of that statute. The Norris–La Guardia Act is likewise a statute earlier than the Taft–Hartley Act. The general structure, detailed provisions, declared purposes, and legislative history of that statute show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made. [citing cases] Indeed one of the very objects of the statute was to induce the parties instead of promptly going to court for broad injunctions hastily issued, restraining tortious or other conduct, first "to make every reasonable effort to settle such dispute *** by *** voluntary arbitration." §8 of the Norris–La Guardia Act, 47 Stat. 72, 29 U.S.C.A. §108.

The District Court in the instant case recognized that the courts which had previously considered this problem of

jurisdiction had found that they had jurisdiction to consider injunctions of "breach of collective bargaining contracts or for other related equitable remedies," but rejected their rulings.

There is more than abundant authority in the cases heretofore cited to sustain the jurisdiction of the District Court in this case. The cited cases indicate that injunctive as well as declaratory relief may be granted. Under these cases even if the court was of the opinion that injunctive relief was precluded, declaratory relief should have been granted. The dismissal of the action only served to postpone and defer the settlement of a problem of vital concern to the members of appellant union as well as to the appellee.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the District Court had jurisdiction to entertain appellant's petition, to declare the parties' rights under the contract and, upon a proper showing, to grant ancillary injunctive relief.

DATED at Honolulu, T. H., this 22nd day of December, 1953.

Respectfully submitted,

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No. 14,098

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,
Appellant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

NATURE OF ACTION.

This action was brought in the United States District Court for the District of Hawaii on May 29, 1952, by the International Longshoremen's and Warehousemen's Union, Local 142, hereinafter called the "Appellant", against Libby, McNeill & Libby, hereinafter called the "Appellee". The action was commenced to secure a declaratory judgment and injunctive relief (R. 3-9). The jurisdiction of the dis-

trict court was based upon Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. Sec. 185(a), and upon the Federal Declaratory Judgment Act, 28 U.S.C. Sections 2201-2202 (R. 5). The Appellee filed an answer on September 2, 1952 (R. 9-17). Thereafter on May 30, 1953, the district court issued an order for a pre-trial hearing. After a pre-trial hearing pursuant to said order, the district court entered its Pre-Trial Order on May 11, 1953 (R. 18-23).

Following a hearing, the district court filed a decision on August 6, 1953 in which it held the case must be dismissed for the reason that the court does not have the power to grant the relief prayed for (R. 23-30). An Order of Dismissal was thereupon entered on August 12, 1953 (R. 30-31). A Motion for New Trial made by the Appellant was denied by the district court on September 25, 1953 (R. 37-40). Appellant's Notice of Appeal was filed on October 1, 1953 (R. 40-41).

STATUTORY PROVISIONS INVOLVED.

Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. Sec. 185, and the Federal Declaratory Judgment Act of 1934, 28 U.S.C. Sections 2201-2202, are involved herein. Pertinent portions of these will be set forth in appropriate places in the argument.

STATEMENT OF THE CASE.

The Appellant entitled its initial pleading in this action "Complaint for Breach of Contract and for Declaratory Judgment" (R. 3). The complaint alleges that the action of the Appellee in terminating the employment of a certain named employee solely on the ground that she had reached the age of 65 years was a violation of the collective bargaining agreement (R. 5, 6) to which Appellant and Appellee are bound (R. 4). The Pre-Trial Order contains the same contention of law (R. 21). It appears on the face of the complaint that the agreement expires February 1, 1953 (R. 4). The admitted refusal of the Appellee to arbitrate the issue of the employee's termination was also alleged to be a violation of the agreement (R. 6, 21). The complaint further alleges that, unless the Appellee is restrained and enjoined, many employees will be similarly terminated at the age of 65 years pursuant to the Appellee's policy of terminating the employment of all employees at that age (R. 7).

As a basis for equitable relief by way of injunction, the complaint alleges avoidance of multiplicity of suits, avoidance of irreparable injury to Appellant and absence of a plain, speedy or adequate remedy at law (R. 8). The prayer (R. 8, 18) asks (1) for a declaratory judgment declaring the rights of the parties under the agreement and specifically declaring that the Appellee breached the agreement in removing the employee in question from its payroll and (2) for an injunction restraining the Appellee from

removing from its payroll any other employee covered by the agreement solely upon the ground that the employee has reached the age of 65 years.

Following a hearing pursuant to the court's Pretrial Order, the district court dismissed the case on the ground that the court had no jurisdiction under Section 185 of Title 29 U.S.C. to hear a case "in which the demand is for an injunction of breach of a labor relations contract after a declaration of the rights of the parties" (R. 29, 30).

QUESTIONS PRESENTED.

The principal question presented by this appeal is whether a suit, by a party to a collective bargaining agreement between an employer and a union representing employees in an industry affecting commerce, seeking to enjoin the employer from continuing to carry out a retirement policy alleged to be in violation of the agreement, is within the jurisdiction of the federal district courts under Section 301 of the Labor-Management Relations Act, 1947.

A secondary question, however, is also presented, namely: if such an action is not within the jurisdiction of the district court, does the mere fact that the petitioner also seeks a declaration that the conduct alleged is a violation of such an agreement confer jurisdiction on the court to grant such declaratory relief under the Federal Declaratory Judgment Act?

SUMMARY OF ARGUMENT.

This appeal turns primarily on the interpretation of Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. Sec. 185, commonly referred to as the Taft-Hartley Act.[1] There is no basis for federal jurisdiction of the parties and the subject matter in this case unless Congress conferred such jurisdiction under Section 301. The Federal Declaratory Judgment Act, 28 U.S.C. Sections 2201-2202,[2] has no bearing on the question of federal jurisdiction in this sense since it is not a jurisdiction-conferring act. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667 (1950); *California Ass'n of Employers v. Build-*

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[1]Sec. 301(a) provides:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined by this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[2]Following is the full text of the Federal Declaratory Judgment Act:

"Sec. 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights of and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Sec. 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

ing and Construction Trades Council, 178 P. 2d 175 (CA 9 1949).

The district court held that Section 301, viewed in the light of its legislative history and the jurisdictional limitations imposed by the Norris-LaGuardia Act, 29 U.S.C. Sections 101-115, did not confer upon the federal courts jurisdiction of an action such as this. No matter how the Appellant chooses to characterize its petition here, it is, in essence, in the nature of an equitable action to enjoin an employer from continuing to carry out a policy of retiring employees at the age of 65 years, which conduct is alleged to be in violation of a collective bargaining agreement between the employer and a union representing employees in an industry affecting commerce. Only a few federal courts have thus far considered the question of federal jurisdiction of injunction suits under Section 301. The Courts of Appeal of the Second and Sixth Circuits are in direct conflict on this point. *Alcoa S. S. Co. v. McMahon,* 81 F. Supp. 541 (S.D. N.Y. 1948), *aff'd,* 173 F. 2d 567 (CA 2 1949), *cert. denied,* 338 U.S. 821 (1949); *American Federation of Labor v. Western Union Tel. Co.,* 179 F. 2d 535 (CA 6 1950). The court in the *Alcoa* case held that federal courts do not have jurisdiction in such suits, and the court in the *Western Union* case held that the federal courts do have such jurisdiction. The view taken by the court in the *Western Union* case, we submit, cannot be supported by the language and history of the Taft-Hartley Act and is inconsistent with the Norris-LaGuardia Act.

By this we do not maintain that a proper federal case for a declaration of rights under a collective bargaining agreement could not be made out. We do contend that an action in the nature of a bill in equity for an injunction to prevent alleged breaches of a collective bargaining agreement, such as involved here, is not within the jurisdiction of the federal courts under Section 301 of the Taft-Hartley Act, and that the mere fact that declaratory relief is also requested cannot bring the case within the court's jurisdiction.

ARGUMENT.

THE APPELLANT'S SUIT TO ENJOIN THE ALLEGED BREACH OF A COLLECTIVE BARGAINING AGREEMENT IS NOT WITHIN THE JURISDICTION OF THE DISTRICT COURT UNDER SECTION 301 AND, THEREFORE, DENIAL OF BOTH INJUNCTIVE AND DECLARATORY RELIEF AND DISMISSAL OF THE CASE BY THE DISTRICT COURT WAS MANDATORY.

The Appellant in this case has attempted to establish federal jurisdiction by means which, in *Doehler Metal Furniture Co. v. Warren,* 129 F. 2d 43 (D.C. Cir. 1942), the late Chief Justice Vinson, then Judge of the Court of Appeals for the District of Columbia, termed "a clever use of remedies." The petition here is in substance a suit in equity for an injunction of an alleged breach of a collective bargaining agreement (R. 25). At the time the petition was filed, the Appellant was no doubt aware of decisions such as *Alcoa S. S. Co. v. McMahon,* 81 F. Supp. 541 (S.D. N.Y. 1948), *aff'd,* 173 F. 2d 567 (CA 2 1949), *cert.*

denied, 338 U.S. 821 (1949), in which the court held that there is no original federal jurisdiction of such a suit under Section 301. The same view has since been adopted by the court below in an action involving another local of the same international union with which Appellant is affiliated. *Castle & Cooke Terminals, Ltd., v. Local 137 of the International Longshoremen's and Warehousemen's Union,* 110 F. Supp. 247 (D.C. Hawaii 1953). Apparently it was the Appellant's intention in this case to attempt to avoid the effect of the *Alcoa* decision by adding a prayer for declaratory relief to an equitable petition for an injunction. Such a device cannot increase the jurisdiction of the federal courts.

1. The Federal Declaratory Judgment Act is not a jurisdiction-conferring statute.

The holding of the district court that the Federal Declaratory Judgment Act is not a ground of federal jurisdiction is no longer open to question. *Southern Pacific Co. v. McAdoo,* 82 F. 2d 121 (CA 9 1936); *Marshall v. Crotty,* 185 F. 2d 622 (CA 1 1950); *Putnam v. Ickes,* 78 F. 2d 223 (D.C. Cir. 1935); *Doehler Metal Furniture Co. v. Warren,* 129 F. 2d 43 (D.C. Cir. 1942).

In the *Southern Pacific* case this court has already so held, stating at page 122:

> "The Declaratory Judgment Act * * * is limited in its operation to those cases which would be within the jurisdiction of the federal courts if affirmative relief were being sought * * * The

> mere fact that a declaratory judgment is sought is not, of itself, a ground of federal jurisdiction."

Federal jurisdiction of this action, therefore, must be found outside the Federal Declaratory Judgment Act.

2. This is an action in equity for an injunction.

If the prayer for declaratory relief in this case is deleted from the petition, the real subject matter of the suit becomes at once apparent: it is a claim that the act of the Appellee in retiring a certain employee was a violation of a collective bargaining agreement and that similar acts are threatened and imminent. There follow certain allegations intended to establish equitable jurisdiction coupled with a prayer that such acts be enjoined. Whatever label the Appellant may choose to place on this case, the nature of the action is inescapable. It is a suit for an injunction of the breach of a collective bargaining agreement, without allegations of diversity and jurisdictional amount in controversy. The injection of the prayer for declaratory relief serves only to confuse the real issues involved. The petition here requires no adjudication of rights under the agreement beyond those upon which the immediate injunctive relief must necessarily be based. Calling a case such as this an action for a "declaratory judgment", therefore, is senseless. This point was well put by Judge Learned Hand in the following dictum from *Corcoran v. Royal Development Company,* 121 F. 2d 957, 958 (CA 2 1941), *cert. denied,* 314 U.S. 691 (1941):

> "The parties and the Judge speak of this as an action for a 'declaratory judgment' under Sec. 400 of Title 28 U.S.C.A. and it is true that Sec. 400(1) includes cases where some immediate relief is asked in addition to a 'declaration' of rights. The purpose of this is apparent; there may be situations in which a plaintiff needs immediate relief, but also needs an adjudication of rights other than those upon which the immediate relief is dependent. In such situations the action has two aspects: in part it is an ordinary action; in part it is an action for 'declaratory judgment'. But it is absurd to speak of a judgment as declaratory in so far as it declares no more than is necessary to sustain the immediate relief prayed, for in that sense every action is for a 'declaratory judgment'. A court cannot grant any relief whatever except as it finds, and by finding 'declares', that the plaintiff has those rights on which the remedy must be based. In the case at bar the complaint asks the 'declaration' of no rights that woud not have to be adjudicated before there could be a distribution of the defendant's assets; and stripped of its verbiage, the complaint is no more than a simple creditor's action, asking the distribution of a corporation's assets in equity. We do not mean to imply that jurisdiction of the district court could be determined by a different rule if it had been for a 'declaratory judgment', but the authorities are more literally in point if we treat it as what it really is."

In the same way the case at bar, when stripped down to its essentials, becomes an action in equity for an

injunction against the continuation of an alleged breach of a collective bargaining agreement. The crucial question in this appeal, then, is reduced simply to whether such an action is within the jurisdiction of the federal courts under Section 301.

3. Jurisdiction of injunction suits is not granted to the district courts by Section 301.

Appellant in its opening brief takes the position that because Section 301(a) itself contains "no words of limitation with respect to the nature of a suit over which the court has jurisdiction" (Opening Brief 6), no such limitation can exist. It is claimed that the language of Section 301 is clear and, therefore, that the district court erred in looking outside that section to ascertain the scope of jurisdiction conferred by it. The district court, however, properly recognized that it could not ignore the jurisdictional limitations imposed on federal courts by the Norris-LaGuardia Act. That act places strict limitations on federal jurisdiction of injunction suits in the field of labor disputes. The district court was confronted at the outset, therefore, with the question whether Section 301 was intended to set aside the restrictions of the Norris-LaGuardia Act. The legislative history of the Taft-Hartley Act, the court concluded, showed no such intent.

The courts have frequently pointed out that Congress has been careful to spell out in detail any grant of jurisdiction of injunction suits in the field of labor relations. *Alcoa S. S. Co. v. McMahon,* 81

F. Supp. 541 (S.D. N.Y. 1948), *aff'd,* 173 F. 2d 567 (CA 2 1949), *cert. denied,* 338 U.S. 821 (1949); *Haspel v. Bonnaz, Singer & Hand Embroiderers, Tuckers, Stitchers & Pleaters Union, Local 66,* 112 F. Supp. 944 (S.D. N.Y. 1953); *Duris v. Phelps-Dodge Copper Products Corp.,* 87 F. Supp. 229 (D.C. N.J. 1949); *Local 937, Etc. v. Royal Typewriter Co.,* 88 F. Supp. 669 (D.C. Conn. 1949); and *United Packing House Workers v. Wilson & Co.,* 80 F. Supp. 563 (N.D. Ill. 1948). The Taft-Hartley Act is no exception. It is significant that Section 301 makes no specific or implied grant of jurisdiction to federal district courts of injunction suits by private parties. The same is true of Section 303. In the very same act, on the other hand, Congress was careful to specify in Section 10(l) certain situations in which district courts could entertain petitions by public officers for injunctive relief for the prevention of some particularly grievous forms of unfair labor practices. Again in Section 10(j), the district courts were given jurisdiction to grant to the National Labor Relations Board appropriate injunctive relief in unfair labor practice cases. Section 10(h), moreover, specifically provides that "the jurisdiction of courts sitting in equity shall not be limited by" the Norris-LaGuardia Act with respect to such petitions. Similarly, Section 208 of the Taft-Hartley Act grants jurisdiction to the district courts to enjoin, on petition of the Attorney General at the direction of the President, certain strikes and lockouts imperiling the national health and safety. Here again Section 208(b) specifically makes the Nor-

ris-LaGuardia Act inapplicable in such suits. It must be borne in mind that all of these provisions are found in the very same Act as Section 301. The conclusion is inescapable that if Congress had intended under Section 301 to confer upon federal courts sitting in equity jurisdiction to entertain injunction suits on the petition of private parties, it would have specifically conferred such jurisdiction and specifically made the Norris-LaGuardia Act inapplicable, as it did in Sections 10 and 208 of the Act. This it did not do. For the courts to read such provisions into the general language of Section 301, as a few courts, including one court of appeals, have done, is nothing less than judicial legislation in a field in which Congress has enacted comprehensive legislation relative to labor problems and has carefully defined the respective jurisdiction of the federal courts and administrative agencies, particularly in the matter of injunctions. The court in the *Haspel* case, *supra,* put this tersely when it said at page 946:

> "In a field noted for its delicate problems and in which Congress has erected an elaborate statutory machinery to cope with these problems and in an Act in which Congress has been careful to spell out the remedies it intended to grant, especially injunctive ones, I would hesitate to imply any remedy not expressly provided for by Congress."

This conclusion is not only a necessary one in the light of the language of the Taft-Hartley and Norris-LaGuardia Acts read as a whole; it is fortified by the

legislative history of the Taft-Hartley Act. The district court in its decision in the *Alcoa* case, which was affirmed by the Court of Appeals for the Second Circuit, illustrated this point forcefully when it said at page 543:

> "But Congress did not, in conferring such jurisdiction, expressly withdraw the restrictions of the Norris-LaGuardia Act. Rather, the Senate Report acknowledged that the Norris-LaGuardia Act and many state statutes modeled upon it barred injunctive relief for the enforcement of such agreements. Sen. Rep. No. 105, supra, p. 17; see International Longshoremen's and Warehousemen's Union v. Sunset Line & Twine Co., D.C. N.D. Cal. 1948, 77 F. Supp. 119, 122. Nor can it be implied that Congress intended that the jurisdiction conferred by Sec. 185 should be free of the Norris-LaGuardia Act. In other instances in the same Act, where Congress so intended, it expressly lifted the bar of the Norris-LaGuardia Act. Illustrative are Sections 186, 178. This conclusion is buttressed by the legislative history of the Taft-Hartley Act. The Senate bill, S. 1126, 80th Cong., 1st Sess., 1947, made violation of a collective bargaining agreement an unfair labor practice, subject to injunction as such; Sec. 8(b)(5), Sec. 8(a)(6), S. 1126, 80th Cong., 1st Sess., introduced April 17, 1947. This provision was deleted before final passage. Both the Senate bill and the House bill, H. R. 3020, 80th Cong., 1st Sess., 1947, authorized suits for breach of collective bargaining agreements to be brought in the federal courts, and the House bill specifically provided that the Norris-LaGuardia Act be inappli-

> cable to such suits; Sec. 302(3), H. R. 3020, supra. This provision too was deleted before final adoption of the measure. See Conference Committee Report, Labor Management Relations Bill, 1947, H. R. 3020, 80th Cong., 1st Sess., June 3, 1947."

District courts in other circuits have reached the same conclusion. For example, the court in *Duris v. Phelps-Dodge Copper Products Corp.,* 87 F. Supp. 229 (D.C. N.J. 1949) in rejecting the contention that Section 301 repeals the jurisdictional limitations of the Norris-LaGuardia Act, approved the reasoning of Judge Rifkind in the *Alcoa* case, stating at page 232:

> "Having found in that case that he had a labor problem before him, he concluded that a suit under Sec. 185(a) opened the door for a money judgment only and no equitable relief could be granted."

Similarly, in *Local 937, Etc. v. Royal Typewriter Co.,* 88 F. Supp. 669 (D.C. Conn. 1949) the court having before it an action for damages and injunction for breach of a collective bargaining agreement said at page 669:

> "It is a labor dispute and I agree with Judge Rifkind that Congress would have been more specific if it intended to restore the general power to grant injunctive relief."

To the same effect, the court, in *United Packing House Workers v. Wilson & Co.,* 80 F. Supp. 563 (N.D. Ill. 1948), said at page 567:

> "It is * * * clear that Congress did not intend either by expression or necessary implication, that private parties should have a right to injunctive relief even as an auxiliary remedy in the permitted suit for damages."

And again at page 570:

> "If the plaintiff can plead and establish a claim for damages growing out of a breach of its contract, Sec. 301(a) of the Labor-Management Relations Act of 1947 confers jurisdiction upon this Court to hear and determine such a suit."

The decisions cited by Appellant in its opening brief, [*American Federation of Labor v. Western Union Tel. Co.*, 179 F. 2d 535 (CA 6 1950); *Milk & Ice Cream Drivers v. Gillespie Milk Products Corp.*, 203 F. 2d 650 (CA 6 1953); *Textile Workers Union v. Aleo Manufacturing Co.*, 94 F. Supp. 626 (M.D. N.C. 1950); *Mountain States Division No. 17 Communications Workers of America v. Mountain States Telephone & Telegraph Co.*, 81 F. Supp. 397 (D.C. Colo. 1948); and *Textile Workers Union of America v. American Thread Co.*, 113 F. Supp. 137 (D.C. Mass. 1953)], all of which appear to be in direct conflict with the cases hereinabove cited, are, we submit, poorly reasoned. They focus attention on the brief and general language of Section 301(a), without giving sufficient consideration to other provisions of the Act, such as Section 10(h)(j) and (l) and Section 208(a) and (b). They ignore the legislative history which the court reviewed in the *Alcoa* case. When

these points are considered, it becomes clear that Congress in enacting the Taft-Hartley Act intended to preserve the policies of the Norris-LaGuardia Act except to the extent specifically provided in Sections 10 and 208.

4. The district court has no power to grant declaratory relief in an injunction suit which is not within its jurisdiction.

The Appellant argues that even though the district court concluded that Section 301 does not open the federal courts to injunction suits, declaratory relief nevertheless should have been granted. This argument overlooks two points stated earlier in this brief: *first,* the district court has power to grant declaratory relief only in cases "within its jurisdiction". We have already shown that, with the exception of a prayer for declaratory relief, the case at bar is nothing more or less than an injunction suit brought under Section 301 before a federal court sitting in equity for an injunction of alleged breach of a collective bargaining agreement. We have noted a conflict of authority as to whether such suits are within the jurisdiction of federal courts under Section 301. The better view, we contend, holds that no jurisdiction of such cases exists under Section 301. *Secondly,* the "rights" with respect to which the Appellant seeks a declaration would of necessity have to be determined in connection with the Appellant's suit for affirmative, equitable relief. It is absurd, therefore, to call this case an action for a "declaratory judgment".

Moreover, there is no point here in discussing the question whether a prayer for declaratory relief may properly be joined with a cause of action otherwise within the jurisdiction of the court, such as an action for damages under Section 301, since that is not this case. In this connection, however, we should like to clarify a misleading use of *United Protective Workers of America v. Ford Motor Co.,* 194 F. 2d 997 (CA 7 1952) made in Appellant's opening brief. The statement is made at page 10 of that brief that the suit in the *Ford* case was "for declaratory judgment and further relief" and that "jurisdiction to grant declaratory relief was not questioned". It is true that the court of appeals in the *Ford* case held that a complaint for declaratory relief could be joined with one for damages. It must be noted, however, that the individual employee involved in that case was joined as a party plaintiff and that necessary allegations of diversity and amount in controversy were made. To that extent, then, jurisdiction of the federal court under Section 301 was of no importance. Moreover, the Court of Appeals in the *Ford* case specifically declined to rule on the applicability of the Norris-LaGuardia Act to injunction suits under Section 301, inasmuch as it held that the complaint failed to show that the plaintiffs had no adequate remedy at law. We fail to see, therefore, how the *Ford* case lends any weight to the Appellant's argument here.

Similarly the Appellant's opening brief misuses *Alcoa S. S. Co. v. McMahon,* 81 F. Supp. 541 (S.D. N.Y.

1948), *aff'd,* 173 F. 2d 567 (CA 2 1949), *cert. denied,* 338 U.S. 821 (1949). The brief states at page 10:

> "In the *Alcoa* case, a declaratory judgment was entered even though the court said that injunctive relief was precluded by the Norris-LaGuardia Act."

The fact is that no relief whatever was granted in the case cited by Appellant. The decision in the *Alcoa* case merely discloses that declaratory relief had been granted in some *prior* action. Before what court that prior case was brought, the nature of the complaint therein, and the basis of federal jurisdiction thereof are not disclosed in the *Alcoa* case. Nor have we found any report of the decision in that earlier case. Nevertheless, we can assume that the plaintiff or plaintiffs in the earlier action did establish grounds for federal jurisdiction. It is quite another matter to cite the *Alcoa* case, as the Appellant has done, as holding that a federal court has the power to grant declaratory relief where a suit in such a court sitting in equity is brought under Section 301 to enjoin the alleged breach of a collective bargaining agreement. The *Alcoa* case simply does not so hold. The authority of the *Alcoa* case must necessarily be to the contrary, since, as we have already shown, its clear holding is that such a suit is not within its jurisdiction.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Dated, Honolulu, T. H.,
January 25, 1954.

Respectfully submitted,
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No. 14098

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Appellant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Appellee.

Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S REPLY BRIEF

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SUBJECT INDEX

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APPELLANT'S REPLY BRIEF

QUESTION PRESENTED

The question in this appeal is whether the jurisdiction of federal district courts under Section 301 of the Labor Management Relations Act of 1947, as the court below held, is limited to damage suits or whether district courts have jurisdiction under this section to give declaratory relief in a suit for a breach of a collective bargaining agreement alone or together with ancillary injunctive relief.

REPLY TO ARGUMENT

Appellee, as is to be expected in the light of the lower court's ruling, phrases the question in reverse, making what appellant claims is the horse, the declaratory relief, the cart, and what appellant claims is the cart, the ancillary injunctive relief, the horse.

Appellee makes the simple question involved complex by stating what it calls the principal question and a secondary question. The principal question as stated by appellee is:

> whether a suit, by a party to a collective bargaining agreement between an employer and a union representing employees in an industry affecting commerce, seeking to enjoin the employer from continuing to carry out a retirement policy alleged to be in violation of the agreement, is within the jurisdiction of the federal district courts under Section 301 of the Labor Management Relations Act, 1947? [p. 4, Appellee's Brief]

The secondary question appellee poses is:

> if such an action is not within the jurisdiction of the district court, does the mere fact that the petitioner also seeks a declaration that the conduct alleged is a violation of such an agreement confer jurisdiction on the court to grant such declaratory relief under the Federal Declaratory Judgment Act? [p. 4, Appellee's Brief]

The nature of the suit must be determined by the facts alleged, the pre-trial order, and the relief sought. Appellant's suit is entitled "Complaint for Breach of Contract and Declaratory Judgment." The complaint alleges that appellee breached the collective bargaining agreement when it terminated the employment of one of its employees solely on the basis of age and then refused, pursuant to the requirement of the contract, to submit the matter to an arbitrator for decision. The first paragraph of the prayer for relief sought "that a declaratory judgment be made and entered herein determining and declaring the rights of petitioner and respondent under the collective bargaining agreement, and specifically declaring and adjudging that respondent breached the terms of the agreement . . ." (R. 8) The District Court's statement as to the nature of the proceedings in its pre-trial order reads:

> This is a suit for declaratory judgment, seeking to establish the rights of the petitioner union under a collective

> bargaining agreement and specifically to declare and adjudge that said collective bargaining agreement has been violated by the respondent with respect to an employee named Miyuki Takahama. It is prayed in this action that the respondent be enjoined from continuing to violate the collective bargaining agreement by retiring people of 65 years, for age. [R. 18]

Appellant's contentions of law, set forth in the District Court's pre-trial order are:

1. That the separation of Mrs. Takahama was a violation of the existing contract, Pre-Trial Exhibit No. 5, in that it was neither a layoff nor a discharge and was in no wise provided for by any of the contract's terms.
2. That Mrs. Takahama's grievance should have been arbitrated under the contract. [R. 21]

Thus every relevant fact in the record refutes appellee's description of the suit as "in the nature of an equitable action to enjoin an employer" (Appellee's Brief, p. 6) and a "bill in equity" (Appellee's Brief, p. 7).

While appellant sought ancillary relief in the form of an order enjoining the further breach of the agreement, it is clear that declaratory relief without more would have resolved the controversy between the parties.

An examination of the cases cited in appellant's opening brief, particularly *American Federation of Labor v. Western Union Telegraph Co.*, 179 F.2d 535 (CA 6 1950) (Appellee's Brief, p. 6 and 16; Appellant's Brief, p. 7), shows the source from which appellant drew the form of its complaint. Appellee does not distinguish these cases.

Appellant agrees with appellee that the "Federal Declaratory Judgment Act is not a jurisdiction conferring statute." (Appellee's Brief, p. 8) Appellant invoked the jurisdiction of the court under Section 301 of the Labor Management Relations Act. The cases cited by appellee relate to situa-

tions in which federal courts were held to be without jurisdiction to grant declaratory relief because one or more essential elements of jurisdiction were lacking under 28 U.S.C., Section 1332 and did not involve Section 301.

For example, in *Southern Pacific Co. v. McAdoo,* 82 F. 2d 121 (CA 9, 1936) (Appellee's Brief, p. 8), the court held that it had no jurisdiction because the amount in controversy fell short of the requisite jurisdictional amount. Jurisdiction in the case was based on diversity of citizenship and the alleged existence of a federal question. However, the court noted that an essential element, the jurisdictional amount, was lacking.

In *Marshall v. Crotty,* 185 F.2d 622 (CA 1, 1950) (Appellee's Brief, p. 8) the plaintiff sued for a declaratory judgment that he was entitled to reinstatement in his government post and in a supplementary complaint asked for a writ of mandamus in the event he was not reinstated within thirty days after the issuance of a declaratory judgment. The appellate court ruled that the district court lacked jurisdiction to entertain a direct proceeding for relief in the nature of mandamus. The court also held that any judgment entered in the matter would be futile since it would not be *res judicata* against the employee's superiors and the United States. The court's comment on this point is interesting. It said at page 627:

> "... A declaratory judgment does not command action, and here, indeed, coercive powers in the nature of mandamus would not be within the power of the district court. In some cases the declaratory judgment, without more, is not a futile thing, because of its effect as res judicata in determining the rights of the parties. Thus, if the parties to a contract have an actual controversy as to whether a certain proposed act would be a breach of contract, a declaratory judgment as to the meaning of the contract would be res judicata in a subsequent suit for breach of contract based on the doing of the act in question . . ."

A declaratory judgment here, without more, affords appellant relief and would be "*res judicata* in a subsequent suit for breach of contract," or arbitration. This would still be the situation so far as the past breach of contract is concerned, whether the agreement remains in effect or not.

The court in the case of *Putnam v. Ickes,* 78 F.2d 223 (D.C. Cir. 1935) (Appellee's Brief, p. 8), found among other things that the court lacked jurisdiction over most of the defendants and that the appellants had disclosed no interest in the subject matter of the suit to enable them to maintain an action.

In *Doehler Metal Furniture Co., Inc. v. Warren,* 129 F.2d 43 (D.C. Cir. 1952) (Appellee's Brief, p. 8), the court's opinion was that the complaint showed no actual dispute between the plaintiff and defendant on any question of law and that it failed to state a claim upon which declaratory relief could be granted.

Appellee quotes dictum taken out of context from the case of *Corcoran v. Royal Development Company,* 121 F.2d 957 (CA 2 1941) (Appellee's Brief, p. 9) in support of its position. There the plaintiff apparently attempted to circumvent the requirement of a jurisdictional amount by the use of a declaratory suit. No parallel exists between the situation presented here and the *Corcoran* case in any event, for the allegation of jurisdiction here is based squarely on Section 301.

Appellee argues (Appellee's brief, pp. 11–17) that the district courts have no jurisdiction over injunction suits. In support of this position, it cites several cases which are not in point. For example, the following cases involved charges of unfair labor practices which could only be enforced by the N.L.R.B.: *United Packing House Workers v. Wilson & Co.,* 80 F. Supp. 563 (N.D. Ill. 1948); *Haspel v. Bonnaz, Singer and Hand Embroiderers, Tuckers, Stitch-*

ers, and Pleaters Union, Local 66, 112 F. Supp. 944 (S.D. N.Y. 1953). *Duris v. Phelps-Dodge Copper Products Corp.,* 87 F. Supp. 229 (D.C. N.J. 1949), involved a question of representation within the jurisdiction of the NLRB. These cases are irrelevant because the Labor Management Relations Act of 1947 specifically gives the NLRB original jurisdiction over unfair practice and representation cases and Section 301 of the Act gives federal courts jurisdiction of actions for breach of contract such as involved herein.

In *Local 937, etc., v. Royal Typewriter Co.,* 88 F. Supp. 669 (D.C. Conn. 1949) (Appellee's Brief, p. 12), the court held that injunctive relief based on diversity jurisdiction was barred. Although the court seemed to feel that injunctive relief was barred on the ground that there was a labor dispute, it apparently did not feel confident of that fact for its final conclusion was that no irreparable injury to warrant an injunction was present.

A case which supports appellee's contention that injunctive relief in aid of a declaratory judgment cannot be granted is the case of *Alcoa S. S. Co. v. McMahon,* 81 F. Supp. 541 (S.D. N.Y. 1948) (Appellee's Brief, pp. 7, 11, 18). However, appellee admits that other courts considering the same question have come to a contrary conclusion. These cases have been cited in the appellant's opening brief.

The attention of the court is again directed to *Mountain States Division No. 17 Communications Workers of America v. Mountain States Telephone and Telegraph Co.,* 81 F. Supp. 397 (D.C. Colo. 1948) (Opening brief, p. 10). In a well-considered opinion, the court comes to the conclusion that injunctive relief designed to aid in the enforcement of a collective bargaining agreement is not barred by the provisions of the Norris-La Guardia Act. The court's holding on the question of damages is pertinent. At page 401 of the opinion, the court said:

> It is quite clear the plaintiff has no adequate remedy at law. Damages cannot be adequately measured for violation of the provisions of the contract, such as grievance procedure, arbitration, pensions, disability benefits, termination allowances, etc. To sum up: The contract confers rights and benefits on both parties that cannot clearly be ascertained or measured in damages. That contracts providing for check-off of union dues will be specifically enforced. See Sanford v. Boston Edison Co., 316 Mass. 631, 56 N.E.2d 1, 156 A.L.R. 644: 'Specific performance of a collective bargaining agreement will be granted where damages are an inadequate remedy and specific enforcement will not involve too great practical difficulties.'

District Judge Wyzanski of Massachusetts has also had occasion to deal with the problem of equitable relief under Section 301 and his analytic opinion in *Textile Workers Union of America (CIO) v. American Thread Co.*, 113 F. Supp. 137 (D.C. Mass. 1953) (Opening brief, p. 11), is persuasive. His scholarly discussion of the legislative history and purpose of the section rebuts appellee's assertion that the cases against them are all poorly reasoned. Appellee does not contradict the facts as to Legislative history on which the decision was based.

Unless this court holds, as did the district court, that Section 301 is limited to damage suits alone, appellant is entitled to a reversal of the lower court's order of dismissal.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed.

Dated at Honolulu, T. H., this 23rd day of February, 1954.

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